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In the

Supreme Court of the United States

October Term, 1996

DOROTHY C. ELLIOTT AND ARCHIE ELLIOTT, JR.,
AS REPRESENTATIVES OF THE ESTATE OF ARCHIE ELLIOTT, III,
Petitioners,

v.

JASON LEAVITT AND WAYNE CHENEY,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Defendant police officers admitted shooting petitioners' 24-year-old son to death at close range with a volley of 22 bullets after searching him and then strapping him, clad only in shorts and sneakers, into their cruiser with his hands cuffed behind his back. In this § 1983 case brought by petitioners, the district court denied the defendant police officers' claim that they were entitled to summary judgment on the ground of qualified immunity. It found, after reviewing the summary judgment record, that in light of the physical evidence and the officers' testimony, there was a genuine issue of material fact whether petitioners' son had, as the officers claimed, managed somehow to produce a gun and point it at the officers — which was the basis of their claim that they were entitled to qualified immunity because they could reasonably have believed the force they used was necessary to defend themselves — or had instead been unarmed and manifestly unthreatening when he was slain by the defendants.

The question presented is whether a circuit court of appeals may entertain an appeal from the denial of summary judgment on grounds of qualified immunity that challenges solely the district court's assessment of the evidentiary sufficiency of the summary judgment record, in defiance of this Court's holding in *Johnson* v. *Jones*, 115 S.Ct. 2151 (1995) — as reaffirmed in *Behrens* v. *Pelletier*, 116 S.Ct. 834 (1996), and as followed by every other circuit — that appellate jurisdiction does not lie to review such an interlocutory pretrial determination of the sufficiency of the evidence to defeat a motion for summary judgment on the ground of qualified immunity.

LIST OF PARTIES

The parties to the proceedings in the court of appeals were respondents, Jason Leavitt, Police Officer for District Heights, Maryland, and Wayne Cheney, Police Officer for Prince George's County, Maryland, both in their individual capacities, and petitioners, Dorothy Elliott and Archie Elliott, Jr., in their capacity as representatives of the Estate of Archie Elliott, III. In the district court, the petitioners were also plaintiffs in their individual capacities, and the defendants included, in addition to the respondents, Prince George's County, Maryland, the City of District Heights, Maryland, Prince George's County Police Chief David B. Mitchell in his official capacity, and District Heights Police Chief Michael Conboy in his official capacity.

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OPINIONS BELOW

The panel opinion of the Court of Appeals for the Fourth Circuit is reported at 99 F.3d 640 (4th Cir. 1996) and is reprinted as Appendix A at page A1. The order of the court of appeals recalling the mandate in this case is unreported and is reprinted as Appendix B at page A12. The order of the *en banc* court of appeals denying a *sua sponte* suggestion for rehearing *en banc* and the accompanying concurring and dissenting opinions are reported at 105 F.3d 174 (4th Cir. 1997) and are reprinted as Appendix C at page A14. The order of the *en banc* court of appeals vacating and re-entering judgment as of the date of the denial of the suggestion for rehearing is unreported and is reprinted as Appendix D at page A37. The opinion of the district court denying the respondents' motion for summary judgment on the ground of qualified immunity was delivered from the bench, is unreported, and is reprinted as Appendix E at page A39. The accompanying district court order is unreported and is reprinted as Appendix F at page A48.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was initially entered in this case on November 8, 1996, and was, on April 1, 1997, vacated and re-entered by the *en banc* court of appeals *nunc pro tunc* as of January 24, 1997. This followed the court of appeals's *sua sponte* recall of its mandate on December 2, 1996, and the *en banc* court's subsequent denial of a *sua sponte* suggestion for rehearing *en banc* on January 24, 1997. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

28 U.S.C. § 1291 provides in relevant part:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court.

STATEMENT OF THE CASE

Petitioners, a state court judge and a schoolteacher, brought this suit under 42 U.S.C. § 1983 against two police officers for shooting their 24-year-old son, Archie Elliott, III ["Elliott"], to death during a daylight stop for driving while intoxicated. Undisputed evidence showed that those police officers, respondents here, stopped petitioners' son, clad only in shorts and sneakers, for drunk driving; cuffed his hands securely behind his back; searched him for weapons; put him in the passenger seat of their cruiser; strapped him in place with the lap and shoulder harness of their cruiser; and then, a few moments later, shot him to death at point-blank range from outside the cruiser in a volley of 22 bullets, 14 of which penetrated his body. Undisputed evidence also showed that, when he was found dead at the scene, five bullets having pierced his heart and surrounding arteries, his hands were still cuffed behind his back. Yet the officers, respondents here, claimed qualified immunity, alleging that they acted in self-defense because, even though all of the preceding had indeed occurred as described, before the shooting Elliott had retrieved a hidden gun and somehow pointed it at them from his seat in their cruiser, all while his hands were undeniably cuffed behind his back.

After a pretrial hearing, the district court denied the

officers' motion for summary judgment upon finding that the undisputed physical evidence rendered "improbable" the story told by the police themselves, the only surviving immediate witnesses to the fatal encounter. The district court held that the "factual circumstances," App. A44, demonstrated a genuine issue of material fact that could be resolved only at trial. The district court concluded that there was sufficient evidence in the summary judgment record to support a finding that "things simply did not happen as the officers said they did," App. A46, that petitioners' son had not been pointing a gun at the officers, App. A45-46, that therefore no officers in the circumstances could reasonably have thought they were at risk of being shot, and that the officers shot petitioners' son not in self-defense, but in violation of clearly established law prohibiting the use by police of excessive force.

The officers' purported appeal from that denial of summary judgment alleged only that the district court was wrong to find that the evidence presented a genuine factual dispute as to whether, immediately prior to the shooting, Elliott had "pointed a gun at them with his finger on the trigger." Respondents' Fourth Circuit Brief at 13. Despite this Court's square and repeated holdings that no interlocutory appeal will lie from such a pretrial ruling on the sufficiency of the evidence to demonstrate a fact that would, if true, indisputably defeat a claim of qualified immunity, *Johnson* v. *Jones*, 115 S.Ct. 2151 (1995); *Behrens* v. *Pelletier*, 116 S.Ct. 834 (1996), the Court of Appeals for the Fourth Circuit asserted jurisdiction over the appeal; rejected the district court's evidentiary determination; decided that it was "uncontroverted" that petitioners' son had pointed a gun at the officers, seriously threatening their safety; and directed the district court to enter judgment for the officers without trial.

Because the court of appeals acted without appellate jurisdiction as that jurisdiction has been recently and authoritatively delineated by this Court, certiorari should be

granted, the judgment of the Fourth Circuit summarily reversed or vacated, and the case remanded to that court with directions that the appeal be dismissed for want of jurisdiction.

1. Although even the brief description of this case already given suffices to demonstrate the gravity of the court of appeals's failure to adhere to the limits on its jurisdiction announced by this Court, we set forth the undisputed record facts in more detail below so that this Court can have no doubt that the Fourth Circuit failed to follow the law as it has been explicated by this Court:

During a stop for driving while intoxicated, the petitioners' 24-year-old son, Archie Elliott, III, was shot and killed by respondents, Jason Leavitt, a District Heights, Maryland, police officer, and Wayne Cheney, a police officer from Prince George's County, Maryland. At the time of the shooting, it was a hot, clear, sunny day, see Fourth Circuit Appendix ["4th Cir. App."] 58 (deposition of defendant Leavitt ["Leavitt"]), and Elliott was wearing only cut-off shorts and low-cut sneakers; he was wearing no socks or shirt. 4th Cir. App. 31 (Leavitt); 4th Cir. App. 144 (deposition of defendant Cheney ["Cheney"]). He had been stopped by defendant Leavitt for driving erratically, and, after Elliott had failed several field sobriety tests, defendant Leavitt had handcuffed Elliott's hands behind his back, 4th Cir. App. 35 (Leavitt), and strapped him into the front passenger seat of Leavitt's police cruiser, 4th Cir. App. 42-43 (Leavitt), a bucket seat, with the lap and shoulder harness seatbelt fastened around him, 4th Cir. App. 44 (Leavitt), the door locked, 4th Cir. App. 44-45 (Leavitt), and the passenger side window rolled up, 4th Cir. App. 43 (Leavitt). Leavitt testified that, after cuffing Elliott and before placing him in the cruiser, he "did a pat-down on his person," 4th Cir. App. 37, which revealed nothing: no weapon nor any contraband. *Id.* Leavitt did not notice even a wallet or any money; he did not find, see, or feel a weapon.

4th Cir. App. 38. Leavitt testified that he considered the search thorough given "the situation," in which he was "really concerned with my welfare, the other officers' on the scene, and any pedestrians'." 4th Cir. App. 48. He testified that, even with Elliott's hands cuffed, he was "still concerned about the safety of other officers," because "[w]hen an individual is on either a controlled dangerous substance or alcohol, part of the time they will be combative." 4th Cir. App. 49. He also testified that he specifically remembered checking the back of Elliott's person as part of his search. 4th Cir. App. 38.

Leavitt testified that, as he stood with defendant Cheney conversing on the curb next to, and only a few inches from, the front passenger door of the car, some movement in the car caught his attention. See 4th Cir. App. 56-57. Leavitt testified that he looked into the cruiser from where he was standing and saw that Elliott had somehow twisted his arms, which were still handcuffed, "to the right part of his body, right up around his mid-section"; that he was holding a "small gun" "[in] front" of his body with "both hands"; that it was "pointed at" both officers; that Elliott had his "right index finger" on the trigger; and that he was "squeezing on the trigger." 4th Cir. App. 56-63. Leavitt yelled "Gun!," 4th Cir. App. 166 (Cheney), both defendants drew their service weapons, 4th Cir. App. 166 (Cheney); 4th Cir. App. 64 (Leavitt), and Leavitt ordered Elliott to drop the gun. 4th Cir. App. 64 (Leavitt).

Cheney testified that, when he looked into the cruiser, he saw Elliott, despite having his hands cuffed behind his back, holding a weapon in front of his body in both of his hands. 4th Cir. App. 166. He, too, testified that Elliott was holding the gun "pretty much around the front of him." 4th Cir. App. 174. His testimony, however, was that Elliott was holding the gun "in his lap" on "his right thigh." 4th Cir. App. 173. Cheney was unable to explain how Elliott could possibly have been holding the gun in that way, with his left hand having to come all the way around his body from behind his back. 4th

Cir. App. 174. But Cheney's testimony was clear that Elliott "didn't leave [the gun] off his lap. He had it pointed up" and out the window of the car. 4th Cir. App. 175.

When, according to Cheney and Leavitt, Elliott did not drop this gun, they opened fire on him. 4th Cir. App. 64-65 (Leavitt); 4th Cir. App. 180-81 (Cheney). They fired 22 rounds at the handcuffed Elliott. Their weapons were not automatic; the firing of each round required the trigger to be pulled a separate time. See 4th Cir. App. 16 (Leavitt); 4th Cir. App. 180-81 (Cheney). From approximately six inches outside the car window, 4th Cir. App. 182 (Leavitt), Officer Leavitt pulled his trigger ten times and Officer Cheney twelve. 4th Cir. App. 181 (Cheney). The Medical Examiner's report indicated that 14 of these 22 bullets penetrated Elliott's body, and he was killed as five of them pierced his heart and the surrounding arteries.

Officer Cheney then went over to the car and, according to his testimony, retrieved from Elliott's still-cuffed hands a small gun, which he placed on the trunk of the cruiser. 4th Cir. App. 186.[1] It was later established that the gun that Cheney placed on the trunk of the cruiser was not loaded. 4th Cir. App. 186 (Cheney).[2]

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[1] Cheney also testified that, when he removed Elliott's body from the car, it was no longer belted into its seat. 4th Cir. App. 187. Sergeant David Brown, who arrived on the scene just moments before the shooting, testified that, when he arrived, Elliott "appeared to be secured, handcuffed and seat belted." 4th Cir. App. 238 (sworn statement of Sergeant David M. Brown ["Brown"]).

[2] Other evidence admitted in the district court indicated that the gun was never fingerprinted, although a fiber found on it had been tested and had been found to match Elliott's shorts. 4th Cir. App. 266-72. A medical examiner's report opined that an injury to Elliott's right hand could be "best explained by the deceased's having held an object at the time he sustained his injuries." 4th Cir. App. 110. Evidence also demonstrated that another excessive force complaint had been lodged against Officer Leavitt,

2. Petitioners, Elliott's parents ["the Elliotts"], brought the instant action under 42 U.S.C. § 1983 as representatives of Elliott's estate, alleging in Count I that the defendants used excessive force in violation of the Fourth and Fourteenth Amendments to the United States Constitution.[3] Their § 1983 suit alleged in essence that Elliott in fact was not pointing a gun at the officers at the time he was killed by the defendants' barrage of gunfire, that the defendants did not act in self-defense, and that, wherever the gun originally came from, it was planted after the officers killed Elliott in order falsely to justify their shooting.

Respondents sought summary judgment on the ground that they were entitled to qualified immunity under *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), which provides qualified immunity on the basis of the "objective legal reasonableness" of a defendant's actions. *Id.* at 819. Such immunity is available under *Harlow* to a public official if his "conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818.

The defendants argued in the district court that there was

4th Cir. App. 234 (Brown), and that fifteen months after the shooting, an individual gave a statement to the police that, five months before the shooting, 4th Cir. App. 241-42, Elliott had threatened him with what that individual claimed was the same gun. 4th Cir. App. 356-58 (affidavit of Officer Gheen).

There was no other evidence about the whereabouts of the gun immediately prior to the shooting. Sergeant David Brown, who arrived on the scene shortly before the killing, testified that he could not observe any activity on Elliott's part prior to the shooting, 4th Cir. App. 243, that he did not see the gun prior to the shooting, and that he could not see whence Officer Cheney retrieved the gun, because Cheney had stood with his body blocking Sergeant Brown's view. 4th Cir. App. 244-45.

[3] Three of the other four counts in the complaint were withdrawn by petitioners, and the district court granted summary judgment as to the fifth, an interlocutory ruling from which petitioners have not appealed.

no genuine issue of material fact because the undisputed facts demonstrate that Elliott pointed a gun at them, and that they could therefore reasonably have believed that their actions were necessary in self-defense. It is lawful under the Fourth Amendment for a police officer to use deadly force if (and of course only if) that amount of force is "'objectively reasonable' in light of the facts and circumstances" confronting the officer. See *Graham* v. *Connor*, 490 U.S. 386, 397 (1989).

3. There is no dispute here as to what law is "clearly established." *Harlow*, 457 U.S. at 818. It is settled that the defendants could lawfully use a "reasonable" amount of force in response to a threat to their safety. See *Graham* v. *Connor*, 490 U.S. at 396-97. The parties agree that *if* Elliott was pointing a gun at the respondents, they would be entitled to qualified immunity because their shooting would not violate this clearly established law. The parties also agree that, if Elliott did *not* hold any gun, the respondents would not be entitled to qualified immunity, because their shooting would violate this clearly established law.[4] Accordingly, the only dispute between the parties at summary judgment was a dispute about the facts that led to Elliott's shooting.

After examining the record evidence and all the reasonable inferences that might be drawn therefrom in the light most favorable to the non-moving parties — in this case, the Elliotts — the district court determined that there was a genuine issue of material fact on whose resolution the

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[4] There was no claim by the respondents that any other factual scenario might have occurred that might have entitled the respondents to qualified immunity — for example, that the officers might have seen Elliott reaching for a nearby gun, or that they might have *thought* Elliott to be armed even though he was not. Their only argument in support of qualified immunity was that they shot Elliott when he pointed at them the gun that was recovered at the scene.

defendant officers' entitlement to qualified immunity depended. In particular, the district court found that the evidence created a genuine factual dispute whether "the actions of the officers here were . . . as they stated." App. A45. It held that the "factual circumstances," that is, the undisputed evidence, physical and otherwise — the clothes worn by Elliott, the fact that Officer Leavitt had searched him, the fact that Elliott's hands were cuffed behind his back, the fact that he had been stopped merely for drunk driving, the number of shots fired, and the fact that the gun purportedly retrieved from his hands after the shooting was not loaded — created "significant issues of material fact" about whether Elliott had held a weapon as the defendants claimed, and thus about whether they acted (or could reasonably have believed they were acting) in self-defense at all. See App. A46-47.

4. Respondents thereupon filed this interlocutory appeal. Although an interlocutory appeal from a denial of summary judgment on qualified immunity grounds is appropriate when the district court's ruling turns on whether certain acts do or do not violate "clearly established" law, see *Johnson* v. *Jones*, 115 S.Ct. 2151, 2155 (1995) (citing *Mitchell* v. *Forsyth*, 472 U.S. 511, 528 (1985)), this Court has squarely and unanimously held that an appellate court has *no jurisdiction* to entertain such an appeal where summary judgment is denied solely because of "the District Court's determination that the summary judgment record in th[e] case raise[s] a genuine issue of fact," as to *what acts occurred*. *Id.* at 2156. This Court reiterated the *Johnson* rule again last Term in *Behrens* v. *Pelletier*, 116 S.Ct. 834, 842 (1996) (there is no final, and thus no appealable, decision when the only thing at issue in the interlocutory determination of evidentiary sufficiency to defeat a claim of qualified immunity is "whether the evidence could support a finding that particular conduct occurred").

Nonetheless, the Fourth Circuit purported to exercise

appellate jurisdiction. It reviewed what this Court has described as the district court's interlocutorily "unreviewable determination," *Johnson*, 115 S.Ct. at 2159, that the "issue of fact is 'genuine,'" *id.*, and reversed the denial of summary judgment, concluding upon its own review of the pretrial record that there was, in its opinion, not "any evidence in the summary judgment record that would support th[e] theory that the gun was planted by police." App. A10. It reversed on nothing more than its assessment that the "evidence" was "uncontroverted" that "immediately before firing, Leavitt and Cheney confronted an intoxicated individual pointing a gun at them from only a few feet away with his finger on the trigger." App. A6.

The court of appeals acknowledged this Court's holding in *Johnson* that "a defendant, entitled to invoke a qualified-immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial," App. A9-10 (quoting *Johnson*, 115 S.Ct. at 2159), and acknowledged as well that here "the district court denied summary judgment on the ground that a material issue of fact exists." App. A9. Its only explanation for its apparent failure to follow *Johnson* was that

> This appeal is properly before us . . . because it does not involve whether "particular conduct occurred," but rather an issue of law — whether uncontroverted conduct represented the use of excessive force. As to the material facts here, there is no genuine dispute because plaintiff has come forward with no evidence. See [*Behrens* v. *Pelletier*, 116 S.Ct. 834, 840 (1996)] ("On summary judgment, however, the plaintiff can no longer rest on the pleadings, and the court looks to the evidence before it" in determining whether a defendant is entitled to qualified immunity).

App. A10.

This assertion that the appeal "does not involve whether 'particular conduct occurred,'" when it obviously involves *exactly* and *only* that, amounts to nothing more than a statement that the court of appeals, simply disagreeing with the district court's assessment of the sufficiency of the evidence to defeat summary judgment, concluded that there is no "genuine" factual dispute, and that the facts are instead "uncontroverted." But this is precisely the determination that the court of appeals had *no jurisdiction to make* at this stage of the proceedings: a conclusion that the district court's determination was in error (i.e., that an appeal would be well-taken) obviously cannot serve as a basis for the otherwise-impermissible exercise of appellate jurisdiction over that determination.

5. On December 2, 1996, following the delivery of the opinion of the panel and the issuance of its mandate, the court of appeals on its own motion recalled its mandate. Subsequently, on January 24, 1997, the *en banc* court of appeals issued an order denying a *sua sponte* suggestion for rehearing. Chief Judge Wilkinson, the author of the panel opinion, issued a "concurring" opinion for a majority of the judges of the Fourth Circuit in active service.

In this opinion, the Fourth Circuit *en banc* majority again examined the summary judgment evidence, concluding that all the evidence "corroborates the officers' testimony that Elliott was pointing a gun." App. A17-18. The opinion suggested that failure to permit an interlocutory appeal in the circumstances of this case would permit plaintiffs "to receive an automatic trial" by "simply assert[ing], without any evidence, that 'the police are lying.'" App. A17. It added that, if an interlocutory appeal were not permissible here, plaintiffs "need only assert some factual dispute . . . to ensure themselves a trial." App. A20. The court of appeals, apparently losing sight of the fact that a denial of summary

judgment requires not only an assertion of a factual dispute, but a ruling by a district court that the summary judgment evidence raises a genuine issue of material fact, concluded that unappealability of a denial of summary judgment based on a district court conclusion that there was a genuine dispute about a material fact "cannot be what the Supreme Court had in mind in *Johnson* and *Behrens*." App. A20.

Judge Motz dissented for five members of the *en banc* court from the denial of rehearing *en banc* on the ground that the panel's resolution of the "important and reoccurring" issue involved in this case "is contrary to recent and controlling Supreme Court precedent." App. A36; A24. The dissent concluded that, "[u]nder the principles set forth in *Johnson v. Jones*, and reiterated just last term in *Behrens v. Pelletier*, the instant case is not immediately appealable." App. A24 (citations omitted). Judge Motz wrote:

> Today my colleagues in the majority ignore *Johnson*'s holding that "a defendant . . . may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial," *Johnson*, 115 S.Ct. at 2159, and allow a panel to trade its determination of evidentiary sufficiency for the district court's. All of the rhetoric in the concurrence cannot obscure the panel's decision to replace the district court's finding that "the evidence could support a finding that particular conduct occurred," *Behrens*, 116 S.Ct. at 842, with the conclusion of the panel and concurrence that "every shred of relevant evidence" supports the opposite conclusion. Even if the panel and concurrence were right on the facts (which they are not), they cannot replace the district court's "determination[] of evidentiary sufficiency" with their own under *Behrens*

and *Johnson*. *Behrens*, 116 S.Ct. at 842.

App. A24.

Judge Motz explained that, whether or not the judges of the court of appeals agreed with the conclusion of the district court that the evidence was sufficient to raise a genuine issue of material fact, the district court's decision was subject to the general rule that interlocutory orders are not immediately appealable. App. A27-30. She described the way in which the panel opinion "impermissibly reweigh[ed] the evidence," demonstrating that it "replaced the district court's assessment of the facts with its own," and that it "substitute[d] its reading of the record on the key issue in the case — whether Archie, who had been searched by the police and was dressed only in sneakers and shorts had a gun — for that of the district court." App. A30. And, after canvassing opinions of the other circuit courts of appeals, she concluded that "the panel opinion appears to be the only circuit court opinion that has simply refused to follow the rule clearly enunciated in *Behrens* and *Johnson*." App. A34.

In response to the opinion for the *en banc* majority, she explained that "to follow *Behrens* and *Johnson*" would not "allow plaintiffs to make wild-eyed assertions that appellate courts would rubber-stamp on to trial," because "district courts must, and do, weed out almost all baseless claims," and she argued that "[o]beying the Supreme Court, as we are in any event bound to do, would neither require police officers to place their lives in peril, nor even necessarily require them to go to trial. All that it would do is eliminate an immediate appeal from a district court's denial of summary judgment on evidentiary sufficiency grounds." App. A35-36.[5]

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[5] On April 1, 1997 — after the court of appeals had recalled its mandate and the *en banc* court had subsequently issued its order denying a *sua*

sponte suggestion for rehearing *en banc* — the *en banc* court of appeals vacated the judgment of November 8, 1996, and, on petitioners' motion, re-entered judgment *nunc pro tunc* as of January 24, 1997, the date of its order denying the *sua sponte* suggestion for rehearing. See App. A38. Re-entry of judgment was sought to clarify the procedural significance of the court of appeals's unusual *sua sponte* actions in this case. This petition seeks review of the judgment of November 8, 1996, as re-entered by the *en banc* court of appeals as of January 24, 1997. This petition is timely because, as this Court's decisions make clear, a petition for certiorari is timely so long as it is filed within ninety days of such a re-entry of judgment. See *Wilkins* v. *United States*, 441 U.S. 468, 470 (1979) (per curiam) ("re-entry of . . . judgment" will permit filing of a timely petition for certiorari even when undertaken after the expiration of the original time for seeking certiorari); see also *Doherty* v. *United States*, 404 U.S. 28, 36 (1971) (Douglas, J., concurring) (re-entry of judgment means that "time within which [one] may file his certiorari papers may run anew").

Even without that order re-entering judgment, we believe that the time for filing this petition would have run from the same date, January 24, 1997, rather than from the date of the original judgment, November 8, 1996. The recall of the court of appeals's mandate in this case — like the filing of a timely petition for rehearing — "operate[d] to suspend the finality of the . . . court's judgment, pending the court's further determination whether the judgment should be modified so as to alter its adjudication of the rights of the parties." *Department of Banking of Nebraska* v. *Pink*, 317 U.S. 264, 266 (1942). See, *e.g.*, *Sargent* v. *Columbia Forest Products, Inc.*, 75 F.3d 86, 89 (2d Cir. 1996) (power to recall mandate must be exercised sparingly precisely because it interferes with the finality of judgments); *Nevius* v. *Sumner*, 105 F.3d 453, 460 (9th Cir. 1996) (a mandate may properly be recalled "only when good cause or unusual circumstances exist sufficient to justify a modification or recall of a prior judgment"). In this regard, it is clear in particular that, under the decisional law of the Fourth Circuit, that court understands and intends its orders recalling the mandate so to suspend the finality of its judgments. See *Moore* v. *United States*, 360 F. 2d 353, 357 n.1 (4th Cir. 1965), cert. denied, 385 U.S. 1001 (1967) (Fourth Circuit *sua sponte* "recalled our mandate . . . so as to preserve the opportunity for the taxpayer later to file consolidated petitions to the Supreme Court for a writ of certiorari").

Thus, until the court of appeals's January 24, 1997 Order, a petition to this Court for certiorari would have been premature, because until that Order issued, "there [was] no absolute certainty that the judgment below

REASONS FOR GRANTING CERTIORARI

As Judge Motz's dissenting opinion for five judges below makes plain, the Fourth Circuit is alone in refusing to follow this Court's recent command in *Johnson* v. *Jones*, 115 S.Ct. 2151 (1995), a command reiterated just last Term in *Behrens* v. *Pelletier*, 116 S.Ct. 834 (1996). This Court should therefore grant certiorari, summarily reverse or vacate the judgment of the Fourth Circuit, and remand the case to that court with directions that the appeal be dismissed for want of jurisdiction.

This Court's decision less than two years ago in *Johnson* v. *Jones* was clear and unanimous. The question decided there was whether a district court's order denying summary judgment on grounds of qualified immunity is immediately appealable when that order is based on a conclusion that the summary judgment record reveals a genuine issue of material fact, and when the appeal simply challenges that conclusion and raises no issue as to the legal basis of the claim of immunity. In his opinion for the *Johnson* Court, Justice Breyer wrote: "[W]e hold that a defendant, entitled to invoke a qualified-immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial." *Johnson*, 115 S.Ct. at 2159. *Johnson* held that, "though entered in a 'qualified immunity' case . . . the District Court's determination that the summary judgment

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[would] not be altered. Only when there is such certainty can the judgment properly be made the subject of a petition for certiorari. And thus it is that the time for petitioning for certiorari commences on the date when certainty and finality attach to the action taken by the lower court." Stern, Gressman, Shapiro and Geller, *Supreme Court Practice* 285 (7th ed. 1993). In this case, because of the recall of the mandate, that certainty and finality attached only when the *en banc* court issued its order denying *en banc* rehearing.

record . . . raise[s] a genuine issue of fact . . . is not a 'final decision' within the meaning of" 28 U.S.C. § 1291, and that the courts of appeals therefore lack jurisdiction to entertain interlocutory appeals of such orders. *Id.* at 2156-58.

This Court expressly distinguished those denials of summary judgment as to qualified immunity that are based on a conclusion about the nature of "clearly established" law — a class of cases that are immediately appealable under the "collateral order" doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), see *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985) — from those, like the denial of summary judgment before it in *Johnson* and like the denial of summary judgment in this case, where the denial is based not on a dispute about clearly established law, but solely on a dispute about "whether or not the evidence in the pretrial record was sufficient to show a genuine issue of fact for trial," *Johnson*, 115 S Ct. at 2153. The *Johnson* Court held unambiguously that, in this latter class of cases, the courts of appeals are without jurisdiction to hear immediate appeals. See *id.* at 2156-58.

This line between appealable and unappealable interlocutory orders was reaffirmed last Term in *Behrens* v. *Pelletier*, where this Court, in an opinion by Justice Scalia, repeated that *Johnson* had held "that determinations of evidentiary sufficiency at summary judgment are not immediately appealable merely because they happen to arise in a qualified-immunity case." *Behrens*, 116 S.Ct. at 842. The Court observed that "*Johnson* surely does not mean that *every* . . . denial of summary judgment" that "*includes* a determination that there are controverted issues of material fact" is unappealable. *Id.* at 842 (emphasis added). But the Court explained again that the distinction between the appealable and the non-appealable turned on whether there was a claim of some legal error outside the district court's determination of the adequacy of the summary judgment

record:

> [I]f what is at issue in the sufficiency determination is nothing more than whether the evidence could support a finding that particular conduct occurred, the question decided is not truly "separable" from the plaintiff's claim, and hence there is no "final decision" under *Cohen* and *Mitchell*. See 115 S.Ct. at 2156-2157. *Johnson* reaffirmed that summary-judgment determinations *are* appealable when they resolve a dispute concerning an "abstract issu[e] of law" relating to qualified immunity, 115 S.Ct. at 2158 — typically, the issue whether the federal right allegedly infringed was "clearly established," see, *e.g.*, *Mitchell*, [472 U.S.] at 530-535; *Davis* v. *Scherer*, 468 U.S. 183, 190-193 (1984).

Id. at 842. The *Behrens* Court went on to explain that, in light of the line drawn by *Johnson*, even if there were controverted issues of fact, a denial of summary judgment would be appealable if the claim on appeal was that "all of the conduct which the District Court deemed sufficiently supported for purposes of summary judgment" would, even if ultimately proven at trial, fail to meet "the *Harlow* standard of 'objective legal reasonableness'" — *i.e.*, fail to demonstrate a violation of "clearly established" law. *Id.*

Here, however, the defendants' claim in the appeal to the Fourth Circuit involved nothing more than an argument that the summary judgment evidence was insufficient to support an inference that Elliott did not have a gun at the time he was shot. The defendants did not deny that clearly established law forbade them to shoot him if he did *not* have a gun. "[W]hat is at issue . . . is nothing more than whether the evidence could support a finding that particular conduct occurred." *Id.*

Thus, under *Johnson* and *Behrens*, the court of appeals clearly was without jurisdiction to hear the appeal in the instant case.

Yet the court of appeals refused without meaningful explanation or justification to adhere to the law as articulated by this Court. The panel argued that there was appellate jurisdiction because there was "no evidence to demonstrate the existence of a genuine issue of material fact," App. A9, and opined that petitioners "fail . . . to point to any evidence in the summary judgment record that would support their theory that the gun was planted by police." App. A10. The opinion concurring in the denial of rehearing *en banc* similarly argued that there was appellate jurisdiction because the facts were "undisputed." App. A20.

But these statements, far from serving to *distinguish* the instant case from *Johnson*, demonstrate that the two cases are on all fours. The argument that there was "not a scintilla of evidence" on the plaintiffs' side of the case is precisely the argument this Court held in *Johnson* that the courts of appeals are without jurisdiction to consider. *Johnson*, 115 S.Ct. at 2154. The Fourth Circuit's conclusions in this case do nothing more than state a difference of opinion with the district court about the inferences that can be drawn from the summary judgment evidence before that court. They reflect a determination made at the end of precisely the "detailed evidence-based [appellate] review of the record" that *Johnson* holds to be jurisdictionally barred at this interlocutory stage in the proceedings. *Id.* at 2159.

Such an evaluation of the evidence is prohibited by the limitation Congress imposed in 28 U.S.C. § 1291 on the appellate jurisdiction of the circuit courts of appeals as it has been construed by this Court. But this Court should make no mistake. The district court's conclusion that the evidence here supported an inference that the defendants' version of events was false is more strongly supported even than the district court explicitly acknowledged. Indeed, the physical evidence

alone could give rise to an inference that Elliott was not pointing a gun. He was wearing only shorts and sneakers, clothing in which it would plainly be difficult to hide a gun. He was concededly searched by defendant Leavitt before he was placed in the cruiser. Since such a search is designed precisely to find weapons, Elliott's having been searched gives rise to an inference that, at least after the search, he did not in fact have a gun on his person.[6] This inference is strengthened by Leavitt's own testimony that he was concerned about his safety and the safety of those around him.[7] Elliott's hands were cuffed behind his back, suggesting first that he could have obtained a hidden gun only from the back of his shorts — the one area that defendant Leavitt asserted with certainty he had searched — and second, that it would have been impossible for him to move his hands into the threatening firing position described by the defendants. The officers also described in two distinctly different ways the placement of the cuffed hands in which Elliott was supposedly holding the weapon, suggesting that their story was a fabrication. Elliott was stopped solely for drunk driving — what the district court described as "not the most heinous offense that might be noted," App. A45 — giving rise to a further inference that he was unlikely to have attempted deadly force against the police. The gun purportedly recovered from Elliott after the shooting was unloaded — suggesting that, even if it had been on his

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[6] Leavitt also testified that he believed Elliott might have been on drugs. 4th Cir. App. 28. A search designed to find drugs, which are smaller and more easily concealed than a gun, would have been even more thorough than a search for weapons alone.

[7] It is also strengthened by the fact that Leavitt testified that Elliott kept reaching into the front of his pants during the field sobriety tests. 4th Cir. App. 113. One could reasonably infer that a police officer concerned for his safety would have thoroughly searched that area of Elliott's shorts, where there might have been an indication that he was hiding an object.

person, he would not have brandished it against two armed officers in a threatening manner. Finally, as Judge Motz observed, "a jury could infer that the firing of twenty-two bullets at a handcuffed man evinces a motive other than self-defense." App. A32.[8]

This is not a case — despite the *en banc* majority's suggestion, see App. A17 — in which the district court was faced with internally consistent police testimony countered only by an *assertion* that "the police are lying." For there is undisputed testimony concerning the physical evidence here that draws into question the exculpatory testimony of the defendants. It was this evidence that led the district court to conclude that the defendants' stories were "improbable enough that they do raise issues of fact that a reasonable trier could differ on." App. A44. But even a district court error (if it were that) in concluding that such an assertion, without more, raised a genuine issue of material fact would not be immediately appealable under *Johnson* and *Behrens*. Indeed, in every case where an interlocutory appeal is barred by *Johnson*, there will by definition be an allegation that there is *no* evidence supporting the party that won in the district court. And, of course, even a serious and well-grounded disagreement with the conclusion of the district court on that issue cannot justify the otherwise improper exercise of appellate

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[8] This is not to say that one *must* draw these inferences, of course. But that was not the question before the district court at this early stage in the proceedings. The only question before the district court on summary judgment here was whether, drawing all reasonable inferences in favor of the plaintiffs, the defendants nonetheless would be entitled to judgment as a matter of law on the ground of qualified immunity. And, when being asked to review the district court's denial of summary judgment, the initial question before the court of appeals was solely whether, in light of the basis of the district court's ruling, it had jurisdiction over respondents' interlocutory appeal.

jurisdiction.[9]

Every other circuit court of appeals has adhered since *Johnson* to the line drawn by this Court in *Johnson* (and reaffirmed in *Behrens*) between the appealable and the non-appealable. The *en banc* majority attempted to rely on some post-*Johnson* decisions of the other courts of appeals in which those courts exercised appellate jurisdiction, App. A21-22, but as Judge Motz wrote:

> [E]ach of the cases cited by the concurrence recognize that "[o]rders that resolve a fact-related dispute of 'evidence sufficiency,' i.e. which facts a party may, or may not, be able to prove at trial . . . are not immediately appealable and must await final judgment." *Cantu* v. *Rocha*, 77 F.3d 795, 802 (5th Cir. 1996) (some quotation marks omitted); *Osolinski* v. *Kane*, 92 F.3d 934, 936 (9th Cir. 1996) ("Because the issue appealed here concerns not which facts the parties may be able to prove but whether certain given facts show a violation of clearly established law, we conclude that we have jurisdiction."); *Prosser* v. *Ross*, 70 F.3d 1005, 1006 (8th Cir. 1995)

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[9] Nor could anything turn on the fact that much of the evidence on which petitioners rely is contained in the defendants' own testimony. Summary judgment is to be decided on the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any." Fed. R. Civ. P. 56(c). The source of the evidence before the court is of no moment. In this case, the inescapable physical facts to which the defendants themselves testified give rise to genuine issues of material fact. It would be particularly outrageous if the defendants were to escape trial on the ground that all the record testimony calling into direct question their story concerning their admitted killing of a handcuffed citizen necessarily comes from the defendants' own account of the event because the victim of the shooting was the only other witness — and they succeeded in shooting him to death.

> (*Mitchell* appeals are limited to "abstract issues of law."); *Lennon* v. *Miller*, 66 F.3d 416, 422 (2d Cir. 1995) ("Thus, where a court's denial of summary judgment is based on a determination that certain factual findings are essential to resolving the qualified immunity question, the denial is not reviewable . . . .").

App. A33.[10] Judge Motz continued:

> In fact, contrary to the suggestion of the concurrence, our sister circuits have uniformly

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[10] In none of these cases save one did the court of appeals review the summary judgment record. The *Prosser* court did engage in such a review, but that was because, unlike the instant case, there "[t]he district court did not indicate in its order what material facts it believed were in dispute." *Prosser*, 70 F.3d at 1006. As this Court explained in *Behrens*, such a circumstance may require review of the record even in cases presenting only an abstract legal question — cases in which there is therefore appellate jurisdiction under *Johnson*:

> [T]he District Court's denial of petitioner's summary-judgment motion necessarily determined that certain conduct attributed to petitioner (which was controverted) constituted a violation of clearly established law. *Johnson* permits petitioner to claim on appeal that all of the conduct which the District Court deemed sufficiently supported for purposes of summary judgment met the *Harlow* standard of "objective legal reasonableness." . . . [W]hile the District Court, in denying petitioner's summary-judgment motion, did not identify the particular charged conduct that it deemed adequately supported, *Johnson* recognizes that under such circumstances "a court of appeals may have to undertake a cumbersome review of the record to determine what facts the district court, in the light most favorable to the nonmoving party, likely assumed." *Johnson*, 115 S.Ct. at 2159.

Behrens, 116 S.Ct. at 842.

followed the *Behrens-Johnson* rule . . . and have held that an appellate court cannot review a district court's evidentiary sufficiency decision. Thus, in every case in which a district court has set forth the issues of fact that prevented it from granting a defendant summary judgment on qualified immunity grounds, our sister circuits have held they lacked jurisdiction and so dismissed the appeal. *See*, *e.g.*, *Jackson* v. *McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996) ("The [defendants] further argue that [the plaintiff] failed to show a genuine issue of material fact . . . . As to that question we lack jurisdiction."); *Shinault* v. *Cleveland County Bd. of County Comm'rs*, 82 F.3d 367, 370 (10th Cir. 1996) ("The scope of [*Mitchell*] appeals, however, is limited to 'purely legal' challenges to the district court's ruling . . . . We lack jurisdiction over [this] appeal."); *Woolfolk* v. *Smith*, 81 F.3d 741, 743 (8th Cir. 1996) (finding no jurisdiction in a case of an officer shooting a suspect because "this is the type of fact-based qualified immunity decision that is not appropriate for interlocutory appeal"); *Rambo* v. *Daley*, 68 F.3d 203, 207 (7th Cir. 1995) ("The essential dispute, therefore, concerns whether the plaintiff's version of the facts is true . . . . [T]he *Mitchell* exception does not allow us to hear [factual] disputes . . . ."); *Tamez* v. *City of San Marcos*, 62 F.3d 123, 125 (5th Cir. 1995) (Because the lower court found "that genuine issues of material fact exist[ed] which preclude[d] summary judgment . . . . [W]e lack jurisdiction over [this] interlocutory appeal."); *see also Stella* v. *Kelley*, 63 F.3d 71, 75 (1st Cir. 1995) ("[W]e lack the power to inquire into, or address . . . the fact-based question of what the evidence does (or does not) show concerning whether the [defendant's] actions violated the asserted right.").

App. A33-34. As Judge Motz concluded,

> In sum, rather than being consistent with out-of-circuit precedent, the panel opinion is distinctly out of sync. Indeed, the panel opinion appears to be the only circuit court opinion that has simply refused to follow the rule clearly enunciated in *Behrens* and *Johnson*.

App. A34.

CONCLUSION

In circumstances such as these, where a court of appeals simply fails to follow the clear command of this Court's recent and binding precedent, this Court has found it appropriate to restore uniformity to federal law and to enforce the command of its own decisions by granting certiorari and summarily reversing. See, *e.g.*, *Lambert* v. *Wicklund*, 117 S.Ct. 1169, 1170 (1997) (per curiam) ("Because the Ninth Circuit's holding is in direct conflict with our precedents, we grant the petition for a writ of certiorari and reverse."); *NLRB* v. *International Ass'n of Bridge, Structural & Ornamental Ironworkers, Local 480*, 466 U.S. 720, 721 (1984) (per curiam) (Because the Third Circuit's "decision . . . apparently is inconsistent with this Court's precedents, we grant the petition for writ of certiorari and reverse."); *Thurston Motor Lines, Inc.* v. *Jordan K. Rand, Ltd.*, 460 U.S. 533, 534-535 (1983) (per curiam) (summarily reversing court of appeals decision that could not be "reconciled with" Supreme Court precedent the "clear import" of which "[o]ther federal courts have had no difficulty in following").

In this appeal, there was no claim of abstract legal error; the defendants' only complaint was that the district court had erroneously determined that there was a genuine issue of

material fact on which their claim of qualified immunity concededly turned. Under *Johnson* and *Behrens*, therefore, there was no basis for the exercise of appellate jurisdiction by the court below. Consequently, this Court should grant certiorari, summarily reverse or vacate the judgment of the Fourth Circuit, and remand the case to that court with directions that the appeal be dismissed for want of jurisdiction.

Respectfully submitted,

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April 24, 1997

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

DOROTHY C. ELLIOTT, Individually and as Co-Personal Representative of the Estate of Archie Elliott, III; ARCHIE ELLIOTT, JR., Individually and as Co-Personal Representative of the Estate of Archie Elliott, III, *Plaintiffs-Appellees*,	*	
v.	*	
JASON LEAVITT, Police Officer for District Heights, MD, *Defendant-Appellant*,	*	No. 96-1150
and	*	
PRINCE GEORGES COUNTY, MARYLAND; DAVID B. MITCHELL, Prince Georges County Police Chief; WAYNE CHENEY, Police Officer; CITY OF DISTRICT HEIGHTS, MD; MICHAEL CONBOY, Police Chief for District Heights, MD, *Defendants.*	*	

DOROTHY C. ELLIOTT, Individually and as Co-Personal Representative of the Estate of Archie Elliott, III; ARCHIE ELLIOTT, JR., Individually and as Co-Personal Representative of the Estate of Archie Elliott, III,
Plaintiffs-Appellees,

v.

WAYNE CHENEY, Police Officer,
Defendant-Appellant, No. 96-1151

and

JASON LEAVITT, Police Officer for District Heights, MD; PRINCE GEORGES COUNTY, MARYLAND; DAVID B. MITCHELL, Prince Georges County Police Chief; CITY OF DISTRICT HEIGHTS, MD; MICHAEL CONBOY, Police Chief for District Heights, MD,
Defendants.

Appeals from the United States District Court
for the District of Maryland, at Greenbelt.
Peter J. Messitte, District Judge.
(CA-93-4078-PJM)

Argued: September 25, 1996

Decided: November 8, 1996

Before WILKINSON, Chief Judge, and WILKINS and WILLIAMS, Circuit Judges.

Reversed by published opinion. Chief Judge Wilkinson wrote the opinion, in which Judge Wilkins and Judge Williams joined.

COUNSEL

ARGUED: Daniel Karp, ALLEN, JOHNSON, ALEXANDER & KARP, Baltimore, Maryland, for Appellant Leavitt; Andrew Jensen Murray, Associate County Executive, Upper Marlboro, Maryland, for Appellant Cheney. Robert W. Mance, III, MUNDY, HOLT & MANCE, Washington, D.C., for Appellees. **ON BRIEF**: Denise Ramsburg Stanley, ALLEN, JOHNSON, ALEXANDER & KARP, Baltimore, Maryland, for Appellant Leavitt.

OPINION

WILKINSON, Chief Judge:

The parents of Archie Elliott III brought suit under 42 U.S.C. §1983 alleging that police officers Jason Leavitt and Wayne Cheney used excessive force in the course of arresting Elliott for driving while intoxicated. The district court denied the officers' motion for summary judgment, and the officers filed this appeal challenging the court's refusal to grant them qualified immunity. We reverse the judgment of the district court, finding that the officers' use of deadly force in response to an obvious, serious, and immediate threat to their safety was reasonable under *Graham v. Connor*, 490 U.S. 386 (1989). The Constitution simply does not require police to gamble with their lives in the face of a serious threat of harm.

I.

On June 18, 1995, police officer Jason Leavitt stopped motorist Archie Elliott. Elliott smelled of alcohol, and he admitted that he had been drinking excessively. Elliott failed several sobriety tests and was having trouble walking. Leavitt called for backup, handcuffed Elliott, and advised him that he was under arrest for driving while intoxicated. Leavitt briefly searched Elliott, finding no weapon or other contraband. Leavitt remembers checking the back side of Elliott's body but does not recall whether he checked the front.

Officer Wayne Cheney soon joined Leavitt on the scene. Cheney assisted Leavitt in placing Elliott in the front passenger seat of Leavitt's police car with the seatbelt fastened, the door closed, and the window rolled up.

The officers were talking by the passenger side of the car when Leavitt noticed a movement and looked to find Elliott with his finger on the trigger of a small handgun pointed at Leavitt and Cheney. Cheney also saw the gun. Elliott was very thin; he had released the seat belt and twisted his arms to the right side of his body to position the weapon. Leavitt yelled, "Gun!," and ordered Elliott to drop it. After Elliott did not respond, Leavitt and Cheney commenced firing, killing Elliott. The officers did not discharge all of their bullets; 22 were fired while 10 were found still in their weapons. Cheney then retrieved the gun, which had remained clasped in Elliott's hand.

A grand jury declined to take action on the shooting, and an internal affairs investigation recommended that both officers be exonerated. The investigation revealed that a few months prior to the shooting, Elliott had threatened a motorist with a handgun. In a sworn statement, the motorist identified the gun recovered from Elliott's body as the same one used to threaten him. An FBI lab report revealed that a blue fiber caught on the gun came from

Elliott's shorts. Elliott's parents, as representatives of his estate, then brought this § 1983 excessive force claim against Leavitt and Cheney.

II.

Claims that law enforcement officers used excessive force when making an arrest "should be analyzed under the Fourth Amendment and its 'reasonableness' standard." *Graham*, 490 U.S. at 395. The standard of review is an objective one. The intent or motivation of the officer is irrelevant; the question is whether a reasonable officer in the same circumstances would have concluded that a threat existed justifying the particular use of force. *Id.* at 396-97. A police officer may use deadly force when the officer has sound reason to believe that a suspect poses a threat of serious physical harm to the officer or others. *Tennessee v. Garner*, 471 U.S. 1 (1985).

This circuit has recognized the doctrine of qualified immunity in excessive force cases, and the inquiry under *Graham* must reflect the considerations underlying the analysis of an immunity defense. *See Slattery v. Rizzo*, 939 F.2d 213 (4th Cir.1991). A reviewing court may not employ "the 20/20 vision of hindsight" and must make "allowance for the fact that police officers are often forced to make split-second judgments — in circumstances that are tense, uncertain, and rapidly evolving." *Graham*, 490 U.S. at 396-97. The court's focus should be on the circumstances at the moment force was used and on the fact that officers on the beat are not often afforded the luxury of armchair reflection. *Greenidge v. Ruffin*, 927 F.2d 789, 791-92 (4th Cir.1991) (citing *Graham*, 490 U.S. 386).

A.

Appellees suggest that Elliott did not pose a real threat to the officers, noting that his hands were handcuffed behind his back,

that he was placed in the front passenger seat with the seatbelt fastened and the window up, and that the officers were outside the car at the time of the shooting. Such a conclusion, however, is untenable in light of uncontroverted evidence that immediately before firing, Leavitt and Cheney confronted an intoxicated individual pointing a gun at them from only a few feet away with his finger on the trigger. The car window was no guarantee of safety when the pointed gun and the officers at whom it was aimed were in such close proximity. Moreover, expert testimony in the summary judgment record emphasized that even suspects with their hands handcuffed behind their backs have been able to position a concealed weapon so as to fire at an arresting officer.

We have upheld the use of deadly force in cases where the nature and extent of the threat was much less clear to the officers than it was in the case before us. In *Greenidge*, 927 F.2d 789, for example, we affirmed the judgment in favor of Officer Ruffin although Ruffin was unable to confirm the nature of the weapon before she used deadly force to protect herself. Ruffin witnessed two individuals performing an illegal sex act in a car. She drew her revolver when neither responded to her order to place their hands in view. Ignoring a second order, one of the passengers reached for a long cylindrical object behind the seat. Although the object turned out to be a wooden nightstick, Ruffin believed that it was a shotgun and fired in self-defense. In contrast, here both Leavitt and Cheney clearly saw that Elliott had a handgun. We also note that, like Officer Ruffin, the officers did not immediately use deadly force but fired only after Elliott ignored the order to drop his weapon.

In *Slattery*, 939 F.2d 213, we held that an officer reasonably felt threatened in a situation where he could not see the suspected weapon at all. During a narcotics arrest, Officer Rizzo went to take custody of Slattery, a passenger in a suspect's car. Rizzo drew his revolver after Slattery ignored repeated orders to place his hands in view. Rizzo could not see Slattery's left hand but could tell that

it was partially closed around an object. In response to yet another order to raise his hands, Slattery turned his entire upper body toward the officer. Believing that Slattery was coming at him with a weapon, Rizzo fired. The object later was identified as a beer bottle. We upheld Rizzo's use of force even though he could not confirm that the suspect was holding a weapon and even though it was not entirely clear that Slattery's movement was the beginning of an attack. Here it was obvious that Elliott had a gun pointed at the officers ready to fire. Given the significantly greater clarity of the threat in this case, *Greenidge* and *Slattery* compel us to conclude that Leavitt and Cheney's use of deadly force was reasonable under the circumstances.

B.

Both appellees and the district court suggest to us several grounds on which *Greenidge* and *Slattery* might be distinguished. None of those grounds, however, serve to vitiate the use of force employed in this case.

The district court stated that "arguably it's not clear what [Elliott was] intending to do with the weapon except perhaps move his hands around and be threatening, but the officers on the outside certainly don't have to go on the inside; they can move farther away." This suggestion that the officers might have responded differently is exactly the type of judicial second look that the case law prohibits. Furthermore, even if Elliott's specific intent were relevant, it is not clear what other evidence of intent the district court would require — Elliott was pointing his gun at the officers with his finger on the trigger and ignored the order to drop his weapon. Given the officers' proximity to the car, it is also unclear that they could have moved away from the car quickly enough to avoid being shot.

The critical point, however, is precisely that Elliott was "threatening," threatening the lives of Leavitt and Cheney. The

Fourth Amendment does not require police officers to wait until a suspect shoots to confirm that a serious threat of harm exists. The court's comment that the officers could have moved away from the car is, unfortunately, a suggestion more reflective of the "peace of a judge's chambers" than of a dangerous and threatening situation on the street. *See Graham*, 490 U.S. at 396.

The district court's concern that the number of shots fired was excessive is likewise misplaced. The number of shots by itself cannot be determinative as to whether the force used was reasonable. Both officers fired almost simultaneously; neither officer emptied his gun; and the evidence indicates that the shooting took place within a matter of seconds. That multiple shots were fired does not suggest the officers shot mindlessly as much as it indicates that they sought to ensure the elimination of a deadly threat.

Appellees make much of the fact that Leavitt searched Elliott only cursorily before placing him in the car. Even assuming Leavitt should have conducted a more intensive search, this issue is irrelevant to the excessive force inquiry. As we noted in *Greenidge*, *Graham* requires us to focus on the moment force was used; conduct prior to that moment is not relevant in determining whether an officer used reasonable force. *Greenidge*, 927 F.2d at 791-92. In *Greenidge* we specifically rejected appellants' argument that Officer Ruffin's failure to obtain proper backup and employ a flashlight was relevant: In light of "the Supreme Court's focus on the very moment when the officer makes the 'split-second judgments,' . . . events which occurred before Officer Ruffin opened the car door and identified herself to the passengers are not probative of the reasonableness of Ruffin's decision to fire the shot." *Id.* at 792.

Finally, we must reject appellees' contention that Elliott's intoxication somehow made him less threatening. The record suggests the contrary. Elliott's aggressive, intoxicated behavior

appears to have motivated Leavitt to focus on handcuffing Elliott and placing him in the car rather than on conducting an exacting search which would have forced Leavitt to remain in close proximity to Elliott. Expert testimony was also placed in the summary judgment record supporting the unremarkable proposition that intoxicated suspects are often more dangerous to police officers than sober ones.

No citizen can fairly expect to draw a gun on police without risking tragic consequences. And no court can expect any human being to remain passive in the face of an active threat on his or her life. As *Greenidge* and *Slattery* illustrate, the Fourth Amendment does not require omniscience. Before employing deadly force, police must have sound reason to believe that the suspect poses a serious threat to their safety or the safety of others. Officers need not be absolutely sure, however, of the nature of the threat or the suspect's intent to cause them harm — the Constitution does not require that certitude precede the act of self protection.

C.

Appellees maintain finally that the denial of summary judgment was proper due to the existence of factual disputes between the parties. Because there is no evidence to demonstrate the existence of a genuine issue of material fact, however, we find that the officers' appeal of the denial of qualified immunity is properly before us and that the officers are entitled to summary judgment.

We note first that although the district court denied summary judgment on the ground that a material issue of fact exists, this interlocutory appeal is not improper under *Johnson v. Jones*, 115 S.Ct. 2151 (1995). In *Johnson*, the Court held that "a defendant, entitled to invoke a qualified-immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth

a 'genuine' issue of fact for trial." *Id.* at 2159. The next term, however, the Court qualified this potentially broad proposition. *See Behrens v. Pelletier*, 116 S.Ct. 834 (1996). The *Behrens* Court stated that Johnson does not invariably prohibit appeal of a denial of summary judgment where the denial is based on the alleged existence of an issue of fact. *Behrens*, 116 S.Ct. at 842. "*Every* denial of summary judgment ultimately rests upon a determination that there are controverted issues of material fact," the Court noted, "and *Johnson* surely does not mean that *every* denial of summary judgment is nonappealable." *Id.* (emphasis in the original).

This appeal is properly before us under *Behrens* because it does not involve whether "particular conduct occurred," but rather an issue of law — whether uncontroverted conduct represented the use of excessive force. As to the material facts here, there is no genuine dispute because plaintiff has come forward with no evidence. *See id.* at 840 ("On summary judgment, however, the plaintiff can no longer rest on the pleadings, and the court looks to the evidence before it" in determining whether a defendant is entitled to qualified immunity.).

With regard to material facts, appellees provide only speculation. They claim that the officers' account of events is not credible because it is improbable, but present no evidence to contradict the officers' testimony. Their only specific, material factual contention is that Elliott did not in fact have a gun at the time of the shooting. Appellees fail, however, to point to any evidence in the summary judgment record that would support their theory that the gun was planted by police.

In contrast, the officers' claim that Elliott was holding a gun when they shot him is corroborated by substantial evidence. A medical examiner, for example, testified that the best explanation for wounds on Elliott's right hand was that he had been holding something at the time of the shooting. In addition, the FBI lab report concluded that the blue fiber caught on the gun

came from Elliott's shorts. Finally, the motorist that Elliott had threatened a few months before identified the gun in an affidavit as the one Elliott had used in that prior incident.

The other facts referenced by appellees are not controverted and do not alter the inescapable conclusion that the officers were confronted with a serious threat to their safety. Leavitt's search, Elliott's intoxication, the number of shots fired, the positioning of Elliott and the officers at the time of the shooting, and the manner in which Elliott was restrained do not change the fact that Leavitt and Cheney faced an individual at close range who was pointing a gun at them with his finger on the trigger.

III.

Inasmuch as the force used by the officers was objectively reasonable under *Graham*, we reverse the judgment of the district court. We remand the case with directions that it be dismissed.

REVERSED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
December 2, 1996

No. 96-1150
CA-93-4078-PJM

DOROTHY C. ELLIOTT, Individually and as Co-Personal Representative of the Estate of Archie Elliott, III; ARCHIE ELLIOTT, JR., Individually and as Co-Personal Representative of the Estate of Archie Elliott, III

Plaintiffs-Appellees

v.

JASON LEAVITT, Police Officer for District Heights, MD

Defendant-Appellant

and

PRINCE GEORGE'S COUNTY, MARYLAND; DAVID B. MITCHELL, Prince George's County Police Chief; WAYNE CHENEY, Police Officer; CITY OF DISTRICT HEIGHTS, MD; MICHAEL CONBOY, Police Chief for District Heights, MD

Defendants

No. 96-1151
CA-93-4078-PJM

DOROTHY C. ELLIOTT, Individually and as Co-Personal Representative of the Estate of Archie Elliott, III; ARCHIE ELLIOTT, JR., Individually and as Co-Personal Representative of the Estate of Archie Elliott, III

Plaintiffs-Appellees

v.

WAYNE CHENEY, Police Officer

Defendant-Appellant

and

JASON LEAVITT, Police Officer for District Heights, MD; PRINCE GEORGE'S COUNTY, MARYLAND; DAVID B. MITCHELL, Prince George's County Police Chief; CITY OF DISTRICT HEIGHTS, MD; MICHAEL CONBOY, Police Chief for District Heights, MD

Defendants

ORDER

This Court recalls the mandate in this case pending further order of this Court.

For the Court,

/s/ Patricia S. Connor
Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

DOROTHY C. ELLIOTT, Individually and as Co-Personal Representative of the Estate of Archie Elliott, III; ARCHIE ELLIOTT, JR., Individually and as Co-Personal Representative of the Estate of Archie Elliott, III,

Plaintiffs-Appellees,

v.

JASON LEAVITT, Police Officer for District Heights, MD,

Defendant-Appellant,

No. 96-1150

and

PRINCE GEORGES COUNTY, MARYLAND; DAVID B. MITCHELL, Prince Georges County Police Chief; WAYNE CHENEY, Police Officer; CITY OF DISTRICT HEIGHTS, MD; MICHAEL CONBOY, Police Chief for District Heights, MD,

Defendants.

DOROTHY C. ELLIOTT, Individually and as Co-Personal Representative of the Estate of Archie Elliott, III; ARCHIE ELLIOTT, JR., Individually and as Co-Personal Representative of the Estate of Archie Elliott, III, *Plaintiffs-Appellees*,	*	
v.	*	
WAYNE CHENEY, Police Officer, *Defendant-Appellant*,	*	No. 96-1151
and	*	
JASON LEAVITT, Police Officer for District Heights, MD; PRINCE GEORGES COUNTY, MARYLAND; DAVID B. MITCHELL, Prince Georges County Police Chief; CITY OF DISTRICT HEIGHTS, MD; MICHAEL CONBOY, Police Chief for District Heights, MD, *Defendants*.	*	

Filed: January 24, 1997.

ORDER

A member of the Court requested a poll on whether this case should be reheard *en banc*. A majority of the judges in active service voted that it should not be reheard *en banc*.

Judges Hall, Murnaghan, Ervin, Michael, and Motz voted for rehearing *en banc*. Chief Judge Wilkinson, and Judges Russell, Widener, Wilkins, Niemeyer, Hamilton, Luttig, and Williams voted against rehearing *en banc*.

Chief Judge Wilkinson filed an opinion concurring in the denial of rehearing *en banc*, in which Judges Russell, Widener, Wilkins, Niemeyer, Luttig, and Williams joined. Judge Motz filed an opinion dissenting from the denial of rehearing *en banc*, in which Judges Hall, Murnaghan, Ervin, and Michael joined.

The suggestion for rehearing en banc is hereby denied. Entered at the direction of Chief Judge Wilkinson for the Court.

WILKINSON, Chief Judge, concurring in the denial of rehearing en banc:

So it has come to this — my dissenting colleagues would require police officers to gamble with their lives in order to avoid civil liability. It is one thing for courts to deny qualified immunity on the basis of a violation of clearly established law. It is quite another to demand as a condition of that immunity that officers actually await the bullet.

The court's opinion in this case sets forth my position, 99 F.3d 640 (4th Cir.1996), and I would respond to the call for an en banc hearing only briefly here. The dissent effectively reads *Johnson v. Jones*, 115 S.Ct. 2151 (1995), and *Behrens v. Pelletier*, 116 S.Ct. 834 (1996), to abolish the right of law enforcement officers to bring interlocutory appeals within this circuit. It converts even a mere statement that a material fact is undisputed into a forbidden debate over genuineness. If the dissent's position were to prevail, the role of courts under *Mitchell v. Forsyth*, 472 U.S. 511 (1985), in promoting the purposes of qualified immunity on given facts will be severely stricken.

If qualified immunity does not obtain here, it will not obtain anywhere. All plaintiffs need do to receive an automatic trial is simply assert, without any evidence, that "the police are lying." The assertion that Elliott had no gun was only that — an assertion unsupported by any evidence, and I do not understand such bald assertions to substitute for material issues of fact. A skeptical look at police conduct is one thing, but the contention that the officers planted a gun on Elliott requires that courts embrace conspiracy theories of which Oliver Stone would be proud. In fact, not even appellees were so bold as to directly claim either that Elliott did not have a gun or that the gun found on him was planted by the police. Those assertions arise from insinuation embellished by imagination, and that is no replacement for material disputes of fact.

This case is not, as the dissent would have it, a contest over the officers' credibility. Faced with the potential danger of an aggressive, intoxicated suspect, officer Leavitt handcuffed Elliott and placed him in the police car. Shortly thereafter, he and officer Cheney saw Elliott pointing a gun at them at close range with his finger on the trigger. Extensive independent evidence corroborated the officers' account of events. A blue fiber was found caught on the trigger of the gun when it was retrieved from the scene of the incident. FBI laboratory analysis matched the blue fiber to those found on Elliott's blue shorts, indicating that Elliott indeed had the gun concealed on his person when he was stopped. Several months before the shooting, a motorist was involved in an altercation with Elliott where Elliott jumped on the motorist's car, smashed in a window with his foot, verbally abused the motorist, and drew his gun. The motorist signed an affidavit in which he identified the gun recovered from Elliott's body as the same weapon with which Elliott had threatened him in the prior incident. In addition, the medical report on Elliott's wounds concluded that "[t]he injuries of the right fingertips and base of the thumb" were "best explained by the deceased's having held an object at the time he sustained his injuries." This corroborates the

officers' testimony that Elliott was pointing a gun.

The testimony of Leavitt's supervisor, Sergeant Brown, likewise supports Leavitt and Cheney's testimony that Elliott had the gun out when they fired at him. In his deposition, Sergeant Brown stated that immediately before the officers began firing, he heard Leavitt yell "gun, gun" and order Elliott to drop the weapon. This testimony may be discounted only if one assumes either that Leavitt spontaneously put on a masterful theatrical performance to deceive Sergeant Brown or that Sergeant Brown also participated in the "coverup." Brown also testified that the officers were standing immediately next to the passenger side of the police cruiser, where Elliott was seated, when the shooting took place.*

Critical portions of the evidence could not have been planted. The gun, for instance, had distinguishing features, a cut off barrel and white plastic grips. These are the very features which enabled the motorist to identify the weapon as Elliott's. Moreover, the officers could not have manufactured the wounds indicating that Elliott was holding a gun at the time he was shot.

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* In contrast, the dissent's extensive quotation of Sergeant Brown's testimony is beside the point. Sergeant Brown never testified that Elliott did not have a gun, clearly stating at his deposition that he saw Elliott's weapon:

> Q. Did you see the gun?
> A. Yes, I did.
> Q. What type of gun was it?
> A. It appeared to be a small caliber handgun maybe 22 or 25 caliber revolver.
> Q. Now, do you have any reason to believe that that gun was not on the person of the suspect at the time of the shooting?
> A. No, I do not.

The testimony quoted by the dissent indicates only that Sergeant Brown was not in position to see the weapon at the precise moment of the shooting.

Together, this evidence substantiates the critical element of the officers' claim, that Elliott was pointing a gun when they shot him. Appellees' coverup theory also fails to explain the fact that the two officers reacted to the threat instantly and simultaneously, hardly the stuff of scripted conspiracy. In order to conclude that Elliott did not have a gun, one would have to ignore all this evidence and suppose that the defendant officers, Sergeant Brown, the motorist, and the medical examiner's staff were all part of an elaborate coverup. To expand the allegations that far transforms appellees' theory from the baseless to the absurd.

Even the dissent's efforts to create a case for plaintiffs falter. The fact that a suspect was intoxicated makes him no less dangerous and the fact that he was handcuffed tells us nothing about whether he was armed. The dissent's observation that the gun was unloaded does not alter the fact that Elliott had a gun, and that the officers saw the gun pointed directly at them. The officers' subjective intent in firing twenty-two bullets is simply irrelevant to the question whether the officers' behavior was *objectively* reasonable under *Graham v. Connor*, 490 U.S. 386 (1989), and *Tennessee v. Garner*, 471 U.S. 1 (1985). The number of bullets fired is likewise irrelevant; if it was objectively reasonable for the officers to use deadly force, it was also objectively reasonable for the officers to continue firing until they were sure the threat to their lives had ceased.

Nothing in *Johnson* or *Behrens* sought to abolish interlocutory appeals in cases where the material facts are not in dispute. Disputed facts will exist in virtually every confrontation between citizens and law enforcement officers, but *Behrens* made clear that the mere existence of contested facts does not eliminate the right of officials to appeal a denial of qualified immunity. In fact, the Supreme Court stated as much in a sentence the dissent refuses to heed: "Denial of summary judgment often includes a determination that there are controverted issues of material fact, and *Johnson* surely does not mean that every such denial of

summary judgment is nonappealable." *Behrens*, 116 S.Ct. at 842. When reviewing an interlocutory appeal pursuant to *Mitchell v. Forsyth*, *Johnson* instructs us not to second-guess a trial court on questions of "evidence sufficiency." *See Johnson*, 115 S.Ct. at 2156. Where the *material* facts are undisputed, however, an appellate court's determination that the defendant officers are entitled to qualified immunity does not require any reweighing of the evidence. Such a determination is a purely legal one involving only "whether or not certain given facts show[ ] a violation of 'clearly established' law." *Id.* at 2155.

It is instructive to note just how pitifully little my dissenting colleagues would say suffices to vitiate qualified immunity and dismiss an appeal. Despite *Johnson*'s recognition that appellate review of a denial of qualified immunity will at times require a "detailed evidence-based review of the record," *id.* at 2159, the dissent finds even so much as a mere reference to the evidence on defendants' side of the case to involve an impermissible reweighing. In fact, the dissent chastises the defendants' appellate brief for deigning to argue that plaintiffs' case lacked *any* relevant evidentiary support. The dissent's approach is thus apparent: plaintiffs need only assert some factual dispute — however irrelevant to the question of qualified immunity — to ensure themselves a trial, and defendants will not even be permitted to argue that the material facts are undisputed because, according to the dissent, merely making that argument suffices to dismiss their appeal. Consequently, neither the appellate court nor the officers themselves are so much as permitted to make reference to the record for fear of engaging in the forbidden re-evaluation of the evidence. It becomes transparent that the upshot of the dissent will be to dispense with interlocutory appeals altogether and with any meaningful concept of qualified immunity overall.

This cannot be what the Supreme Court had in mind in *Johnson* and *Behrens*. I do not understand *Johnson* to suddenly

disavow a decision, *Mitchell v. Forsyth*, 472 U.S. 511 (1985), that has been a staple of that Court's jurisprudence for many years. Indeed, the Court's holding was premised on the fact that the sufficiency question before it was distinguishable from the qualified immunity issues subject to interlocutory appeal under *Mitchell*. *Johnson*, 115 S.Ct. at 2156-58. *Behrens* even more strongly reaffirmed *Mitchell*. The main holding in *Behrens*, of course, was that officials asserting qualified immunity are entitled to not one but *two* interlocutory appeals on the question of immunity. That case was not the action of a Court bent upon impairing immunity appeals. Instead, *Behrens'* warning that appellate jurisdiction is not abolished simply because the case involves asserted factual disputes was an apparently vain attempt to preempt precisely the sort of over-reading of *Johnson* proposed by my dissenting colleagues. Under *Behrens*, we are to respect the role reserved for the trial court by *Johnson*, but we are not to slam the door to interlocutory appeals on the district court's mere recitation of the mantra that "a genuine issue of fact exists." If this mantra were sufficient to insulate a district court's order from appellate scrutiny, it would become boilerplate in every denial of an immunity defense. While the dissent expresses the respect that each of us has for the efforts of district judges, surely the few brief remarks on the critical issue in this case are not what the dissent desires by way of explication when a defense of qualified immunity is denied.

Other circuits have not hesitated to correct the erroneous application of immunity doctrine on the basis of given material facts. *See Osolinski v. Kane*, 92 F.3d 934, 936 (9th Cir.1996) (awarding immunity and finding that *Johnson* allows immediate review where "the facts alleged in the record before us are not in dispute"); *Cantu v. Rocha*, 77 F.3d 795, 803 (5th Cir.1996) (awarding immunity and finding that *Johnson* allows immediate review where "[i]n contrast to *Johnson*, there is no significant fact-related dispute about [defendants'] actions"); *Prosser v. Ross*, 70 F.3d 1005, 1006-07 (8th Cir.1995) (awarding immunity and

finding that *Johnson* allows immediate review where "the facts required to determine whether [the defendant] is entitled to qualified immunity are not genuinely in dispute"); *Lennon v. Miller*, 66 F.3d 416, 422 (2d Cir.1995) (awarding immunity and finding that *Johnson* allows immediate review where an appeal "poses only a legal question about the objective reasonableness of the defendants' action under undisputed facts"). These circuit decisions all followed *Johnson*. All of these cases involved interlocutory appeals, and all of them resulted in reversal of a district court's denial of qualified immunity.

It is regrettable to have to belabor basic maxims here, but it is necessary to do so because the dissent pays them so little respect. Because the societal costs of lawsuits against public officers stem as much from the trial of such suits as from actual judgments, the Supreme Court has emphasized that qualified immunity "is an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell*, 472 U.S. at 526. This point has been repeated many, many times. *See Behrens*, 116 S.Ct. at 838; *Swint v. Chambers County Commission*, 115 S.Ct. 1203, 1208 (1995); *Digital Equipment Corp. v. Desktop Direct, Inc.*, 114 S.Ct. 1992, 1997 (1994); *Hunter v. Bryant*, 502 U.S. 224, 227 (1991); *Siegert v. Gilley*, 500 U.S. 226, 232-33 (1991); *Van Cauwenberghe v. Biard*, 486 U.S. 517, 521 (1988). Indeed, the Supreme Court has stated in countless qualified immunity cases that "insubstantial claims should not proceed to trial." *Harlow v. Fitzgerald*, 457 U.S. 800, 816 (1982); *accord Behrens*, 116 S.Ct. at 838; *Hunter*, 502 U.S. at 227; *Burns v. Reed*, 500 U.S. 478, 494 n. 8 (1991); *Anderson v. Creighton*, 483 U.S. 635, 640 n. 2 (1987); *Malley v. Briggs*, 475 U.S. 335, 341 (1986); *Mitchell*, 472 U.S. at 526; *Davis v. Scherer*, 468 U.S. 183, 195 (1984); *Butz v. Economou*, 438 U.S. 478, 507-08 (1978). The right to avoid trial is partly assured by the objective reasonableness standard of *Harlow* and partly by interlocutory appeals under *Mitchell*. In the face of this long, unbroken line of precedent

stressing the need to protect officials from a stream of trials from baseless lawsuits, it defies belief that the Supreme Court walked silently and unobtrusively away from interlocutory appeals in the *Johnson* decision.

In the instant case, every shred of relevant evidence — the FBI laboratory analysis of the fiber, the medical examination of Elliott's wounds, the distinctive characteristics of Elliott's gun, the affidavit of the threatened motorist, and the observations of Leavitt's supervisor — demonstrates that the officers were confronted with an intoxicated man threatening them point blank with a gun. What would the dissent have the officers do — stand still and be shot?

The dissent makes a show of following precedent even as it ignores the teachings of *Mitchell*, *Harlow*, and their progeny, and the lessons of *Graham v. Connor* and *Tennessee v. Garner*, *supra*, on the objectively reasonable use of force. Under the dissent's view, no officer will ever be secure using force in self-defense no matter how obvious, immediate, or extreme the danger faced. Indeed, the dissent would make the moment of greatest personal danger for the officer the moment of greatest hesitation. As we sit in comfort in our chambers, we should pause to ponder what the dissenters have decreed for the streets: a rule that would question every action, second-guess every judgment, and scrutinize every move made by a policeman in an instant of personal peril. It is no violation of clearly established law for an officer to act to save his own life. I should have thought that the Court in *Garner/Graham* made one thing clear — that those in robes should not strip those in uniform even of the right to self protection.

Judge Russell, Judge Widener, Judge Wilkins, Judge Niemeyer, Judge Luttig, and Judge Williams join in this opinion.

DIANA GRIBBON MOTZ, Circuit Judge, dissenting from denial of rehearing en banc:

Because the issue presented here is an important one that will frequently confront us and because the panel's resolution of this issue is contrary to recent and controlling Supreme Court precedent, I respectfully dissent from the court's refusal to rehear this case *en banc*. Under the principles set forth in *Johnson v. Jones*, 115 S.Ct. 2151 (1995), and reiterated just last term in *Behrens v. Pelletier*, 116 S.Ct. 834 (1996), the instant case is not immediately appealable.

Today my colleagues in the majority ignore *Johnson*'s holding that "a defendant . . . may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial," *Johnson*, 115 S.Ct. at 2159, and allow a panel to trade its determination of evidentiary sufficiency for the district court's. All of the rhetoric in the concurrence cannot obscure the panel's decision to replace the district court's finding that "the evidence could support a finding that particular conduct occurred," *Behrens*, 116 S.Ct. at 842, with the conclusion of the panel and concurrence that "every shred of relevant evidence" supports the opposite conclusion. Even if the panel and concurrence were right on the facts (which they are not), they cannot replace the district court's "determination[ ] of evidentiary sufficiency" with their own under *Behrens* and *Johnson*. *Behrens*, 116 S.Ct. at 842.

I.

On June 18, 1995, Officer Jason Leavitt stopped twenty-four year old Archie Elliott III, a drunken motorist. Archie complied with the officer's request for his driver's license and registration, stating he just wanted to go home. After Officer Leavitt called for backup, he administered several sobriety tests,

which Archie failed. Then the officer handcuffed Archie's hands behind his back and searched him; Archie was only wearing shorts and sneakers (no shirt or socks). Finding no weapon or other contraband, Officer Leavitt, with the help of Officer Wayne Cheney who had just arrived on the scene, seatbelted Archie in a police cruiser, with the doors locked and windows rolled up. The officers left no weapons in the cruiser.

Leavitt and Cheney testified that minutes later they looked into the cruiser and saw Archie had twisted his arms (which were still handcuffed) to the right side of his body, released the seat belt, and had a small gun in his hands pointed at the officers. Officer Cheney yelled "Gun!" and ordered Archie to drop the gun. After a few seconds, when Archie did not respond, both Cheney and Leavitt fired multiple rounds at Archie, killing him. In all, Cheney and Leavitt fired 22 bullets at Archie; ten bullets remained in their weapons. After the shooting, Cheney opened the car door, retrieved a small gun from Archie's hands, and placed it on the trunk of the cruiser; Archie was still handcuffed.

The above account is entirely based on the deposition testimony of Cheney and Leavitt. Officer Leavitt's supervisor, Sergeant Brown, who arrived at the scene shortly before the killing, testified that he never saw Archie with a gun:

> Q. When Officer Leavitt yelled drop it, drop it, was he directing his comments towards the suspect in the police vehicle?
>
> A. Yes, he was.
>
> Q. Did you observe any or could you observe from where you were standing any activity on the part of the suspect in the vehicle?
>
> A. No, I could not.

Sergeant Brown also testified he never saw the place from which Officer Cheney retrieved the small gun:

> Q. Could you see from what part of the suspect person Officer Cheney retrieved the gun?
>
> A. No.
>
> Q. Why is that?
>
> A. Officer Cheney was directly in front of me.
>
> Q. So you have no knowledge as to where the gun was retrieved?
>
> A. That's correct.[1]

The only other party in a position to know if Archie had a gun, Archie himself, of course, could not dispute the officers' account.

During the ensuing investigation, it was learned that there was a fiber on the small gun that matched Archie's shorts, that the gun was unloaded, that the gun had never been fingerprinted, that a medical examiner believed that the injury in Archie's right hand could best be "explained by the deceased having held an object at the time that he sustained his injuries," that an excessive force complaint had previously been lodged against Officer Leavitt, and that fifteen months after the shooting, a witness gave a statement to police officers that, five months before the shooting, Archie had threatened him with the same small gun.

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[1] Sergeant Brown testified he saw the small gun *after* the officers shot Archie; contrary to the suggestion of the concurrence, Sergeant Brown never testified to seeing the small gun at all before the officers shot Archie.

Archie's parents, Dorothy Elliott and Archie Elliott, Jr., sued Officers Leavitt and Cheney, alleging that Archie had had no gun, and that the officers had planted the gun after they had killed Archie. The officers asserted qualified immunity and moved for summary judgment. If Archie had a gun, circuit precedent entitles the officers to qualified immunity; but if Archie had no gun, not even the officers claim they would be entitled to qualified immunity. Thus, if the defendant officers' version of the facts is accepted, the Elliotts have not alleged a violation of clearly established law, but if the Elliotts' version is accepted, they obviously have alleged such a violation. The only issue is whether the Elliotts have produced sufficient evidence that could support a finding that events took place as they allege, *e.g.*, Archie had no gun. Or put differently, have the Elliotts produced sufficient evidence to demonstrate a dispute as to a material fact — whether Archie had a gun.

The district court concluded that the plaintiffs, Mr. and Mrs. Elliott, had indeed produced sufficient evidence to demonstrate a dispute as to a material fact and, for this reason, refused to grant the officers summary judgment.

II.

Whether or not we agree with the district court, its holding is not immediately appealable. Generally, a federal appellate court only has jurisdiction to consider final decisions. 28 U.S.C. § 1291 (1994).

Under *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949), some interlocutory, non-injunctive orders are appealable, but only if they constitute "collateral" orders.

In *Mitchell v. Forsyth*, 472 U.S. 511(1985), the Supreme Court explained that "a district court's order denying a defendant's motion for summary judgment was an immediately appealable

'collateral order' . . . under *Cohen* where (1) the defendant was a public official asserting a defense of 'qualified immunity,' and (2) the issue appealed concerned . . . whether or not certain given facts showed a violation of 'clearly established' law." *Johnson v. Jones*, 115 S.Ct. 2151, 2155 (1995) (citing *Mitchell*, 472 U.S. at 528). Two years ago, in *Johnson v. Jones*, a unanimous Supreme Court clarified that "the exception to the general rule that interlocutory orders are not immediately appealable — fashioned in *Mitchell* — for orders denying officials qualified immunity prior to trial, did not extend to such orders when they 'resolved a *fact*-related dispute.'" *Buonocore v. Harris*, 65 F.3d 347, 360 (4th Cir.1995) (emphasis in original) (quoting *Johnson*, 115 S.Ct. at 2153). In sum, *Johnson* "unequivocally holds that an order denying summary judgment on qualified immunity grounds insofar as it determines whether 'the pretrial record sets forth a genuine issue of fact' is not immediately appealable." *Id.* at 361 (quoting *Johnson*, 115 S.Ct. at 2159).

Earlier this year in *Behrens v. Pelletier*, 116 S.Ct. 834 (1996), the Supreme Court reiterated that principle. The respondent in that case had asserted that an immediate appeal of the denial of the summary judgment motion was not available because "material issues of fact remain." *Behrens*, 116 S.Ct. at 842. The Supreme Court rejected that argument, noting that *Johnson* does not mean that "every such denial of summary judgment is nonappealable." *Id.* Rather, "summary judgment determinations are immediately appealable when they resolve a dispute concerning an 'abstract issue of law' relating to qualified immunity . . . ." *Id.* (quoting *Johnson*, 115 S.Ct. at 2158). However, the *Behrens* Court was quite clear in reaffirming *Johnson*'s holding that:

> [D]eterminations of evidentiary sufficiency at summary judgment are not immediately appealable merely because they happen to arise in a qualified immunity case; if what is at issue in the sufficiency determination is nothing more than

> whether the evidence could support a finding that particular conduct occurred, the question decided is not truly "separable" from the plaintiff's claim, and hence there is no "final decision" under *Cohen* and *Mitchell*.

Id. (quoting *Johnson*, 115 S.Ct. at 2156-57).

The panel opinion states this principle and purports to find that the case at hand is immediately appealable under *Behrens* because "it does not involve whether 'particular conduct occurred.'" *Elliott v. Leavitt*, 99 F.3d 640, 644 (4th Cir.1996) (quoting *Behrens*, 116 S.Ct. at 842). If that assessment were accurate, I would agree that this case would be immediately appealable; but that assessment simply does not square with the district court's holding. The district court denied summary judgment because it believed there was:

> [A] significant issue of credibility . . . . [U]nder these circumstances there are enough circumstances that a judge making this as a preliminary call could say that a reasonable trier of fact could come to a conclusion that things simply did not happen as the officers say they did. And under those circumstances I don't think that I am able at this point to grant summary judgment on the grounds of the nonexistence of a genuine issue of material fact. There are significant issues of material fact that are present in this case, given the unusual circumstances of the way it occurred.

The district court further explained that Archie was "dressed in such a way as [he was] not likely to have a weapon" and was "searched by an officer, who one would think if he's presumed to have acted regularly, might have found the weapon and did not."

In short, the district court held that there was a question of whether "particular conduct occurred," i.e., the court held that there was sufficient evidence to support the Elliotts' version of the

story and deny summary judgment. This decision is precisely the type that *Behrens* and *Johnson* conclude is not an immediately appealable, final decision. *Behrens* and *Johnson* direct that an appellate court cannot hear appeals of district court decisions which involve a finding that particular conduct occurred, or might have occurred, unless the appellate court can "take, as given, the facts that the district court assumed" and rule as a matter of law. *Johnson*, 115 S.Ct. at 2159. *See also Behrens*, 116 S.Ct. at 842. In this case the panel simply disagrees with the district court's reading of the facts, and impermissibly replaces its reading of the evidence for the district court's.

An examination of the panel opinion itself demonstrates this error. The panel does not apply a purely legal analysis, which *Behrens* and *Johnson* require on immediate appeal, but rather engages in impermissibly reweighing the evidence, which *Johnson* and *Behrens* reserve to the district court. For example, the panel dismisses "[t]he district court's concern that the number of shots fired was excessive," concluding that this concern was "misplaced" because the firing of twenty-two shots at a concededly drunk and handcuffed, but allegedly armed, man does "not suggest the officers shot mindlessly as much as it indicates that they sought to ensure the elimination of a deadly threat." *Elliott*, 99 F.3d at 643. The panel thus replaces the district court's assessment of the facts with its own.

Similarly, the panel substitutes its reading of the record on the key issue in the case — whether Archie, who had been searched by the police and was dressed only in sneakers and shorts had a gun — for that of the district court. Compare the panel's conclusion that "the officers' claim that [Archie] Elliott was holding a gun when they shot him is corroborated by substantial evidence," *Elliott*, 99 F.3d at 644, with the district court's conclusion that the officers' version was "on [its] face improbable enough — not to say untrue — but improbable enough that they do raise issues of fact that a reasonable trier of fact could differ on."

It is simply impermissible under *Johnson* and *Behrens* for an appellate court on an *interlocutory appeal from a denial of summary judgment* to reweigh a district court's reading of the *sufficiency* of the evidence. *See Behrens*, 116 S.Ct. at 842 ("[D]eterminations of evidentiary sufficiency at summary judgment are not immediately appealable merely because they happen to arise in a qualified-immunity case.").

Perhaps the clearest indication that the only issue appealed here is evidentiary sufficiency is the defendant officers' appellate brief. There, they repeatedly assert precisely the sort of "insufficiency of the evidence" arguments that *Johnson* and *Behrens* hold are not appealable. *See, e.g.*, Brief of Appellants at 21 ("Plaintiffs at bar offered no *evidence*, direct or circumstantial, to controvert the testimony of Officers Leavitt and Cheney."); *id.* at 22 ("Plaintiffs at bar pointed to no evidence . . . ."); *id.* at 23 and 24 ("Plaintiffs offered no evidence whatsoever . . . ."); *id.* at 26 and 27 ("No evidence was demonstrated . . . ."); *id.* at 27 ("Plaintiffs' 'dispute' over what the officers observed is also without evidentiary support . . . ."); *id.* at 28 (Plaintiffs "offer no evidence to support an inference that he did not have a weapon."); *id.* at 29 ("Plaintiffs do not offer any evidence, direct or circumstantial, to suggest that Officers Leavitt and Cheney had any reason to fabricate their testimony."); *id.* at 32 ("[T]here is no evidence of any pause in the firing . . . ."); *id.* ("Plaintiffs have failed to demonstrate evidence of a constitutional violation."); *id.* at 33 ("There are no facts to support the district court's finding."). Of course, who can blame the defendants for making these forbidden arguments — they were successful before the panel.

It is also worth noting that in reassessing every nook and cranny of the record below the panel fails to comply with *Johnson*'s requirement that an appellate court "take, as given, the facts that the district court assumed when it denied summary judgment." *Johnson*, 115 S.Ct. at 2159. The concurrence does quote *Johnson*'s statement that a "detailed evidence-based review

of the record" will sometimes be necessary but, like the panel, ignores the *Johnson*'s admonition that this sort of "cumbersome review of the record" is *only* appropriate when a district court has "den[ied] summary judgment without indicating their reasons for doing so." *Id.* When denying summary judgment here the district court fully stated both its "reasons for doing so" and the facts supporting its reasoning.

Lastly, the panel opinion cannot be justified by the claim that the district court's holding was "unsupported by any evidence." Even if the panel could properly replace a district court's sufficiency of the evidence determination with its own, there certainly *was* evidence in this case that Archie did not have a gun. Officer Leavitt himself testified that he searched Archie — who was clothed only in shorts and tennis shoes — and did not find one. Archie was drunk, with his hands cuffed behind his back. The gun he assertedly planned to use was unloaded. These are significant handicaps if his goal was to shoot both officers and escape. There was also evidence that an excessive force complaint had previously been lodged against Officer Leavitt. Finally, although the panel relied on the restraint the officers exhibited in forgoing the use of ten available bullets, a jury could infer that the firing of twenty-two bullets at a handcuffed man evinces a motive other than self-defense. The very implausibility of the incident happening as claimed by the officers could support an inference that the plaintiffs' version of the events was true. The jury wouldn't have to, and perhaps shouldn't, find for the Elliotts on any of these inferences, *but it could.*[2]

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[2] This discussion of the facts is included only in response to the extensive invocation of the facts in the panel opinion and concurrence. Obviously, if an appellate court may not consider "determinations of evidentiary sufficiency," *Behrens*, 116 S.Ct. at 842, or "whether or not the pretrial record sets forth a 'genuine' issue of fact for trial," *Johnson*, 115 S.Ct. at 2159, what an appellate court thinks of the sufficiency of the evidence on appeal is irrelevant. That the panel and concurrence

III.

Before concluding I must respond to some remarks in the concurrence. The first is the concurrence's suggestion that precedent from our sister circuits somehow supports the panel opinion. This is simply not so. Out-of-circuit cases, including the cases cited by the concurrence, offer no support for the extraordinary panel opinion.

In none of the cases relied on by the concurrence did an appellate court overrule a district court's stated factual basis for determining that particular conduct alleged by the plaintiff might have occurred. Indeed, each of the cases cited by the concurrence recognize that "[o]rders that resolve a fact-related dispute of 'evidence sufficiency,' i.e. which facts a party may, or may not, be able to prove at trial . . . are not immediately appealable and must await final judgment." *Cantu v. Rocha*, 77 F.3d 795, 802 (5th Cir.1996) (some quotation marks omitted); *Osolinski v. Kane*, 92 F.3d 934, 936 (9th Cir.1996) ("Because the issue appealed here concerns not which facts the parties may be able to prove but whether certain given facts show a violation of clearly established law, we conclude that we have jurisdiction."); *Prosser v. Ross*, 70 F.3d 1005, 1006 (8th Cir.1995) (*Mitchell* appeals are limited to "abstract issues of law."); *Lennon v. Miller*, 66 F.3d 416, 422 (2d Cir.1995) ("Thus, where a court's denial of summary judgment is based on a determination that certain factual findings are essential to resolving the qualified immunity question, the denial is not reviewable. . . .").

In fact, contrary to the suggestion of the concurrence, our

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repeatedly detail the evidence assertedly supporting their position simply demonstrates that they are indeed doing precisely what the Supreme Court has prohibited — reassessing the evidence on this interlocutory appeal.

sister circuits have uniformly followed the *Behrens-Johnson* rule, just as I would, and have held that an appellate court cannot review a district court's evidentiary sufficiency decision. Thus, in every case in which a district court has set forth the issues of fact that prevented it from granting a defendant summary judgment on qualified immunity grounds, our sister circuits have held they lacked jurisdiction and so dismissed the appeal. *See, e.g., Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir.1996) ("The [defendants] further argue that [the plaintiff] failed to show a genuine issue of material fact . . . . As to that question we lack jurisdiction."); *Shinault v. Cleveland County Bd. of County Comm'rs.*, 82 F.3d 367, 370 (10th Cir.1996) ("The scope of [*Mitchell*] appeals, however, is limited to 'purely legal' challenges to the district court's ruling . . . . We lack jurisdiction over [this] appeal."); *Woolfolk v. Smith*, 81 F.3d 741, 743 (8th Cir.1996) (finding no jurisdiction in a case of an officer shooting a suspect because "this is the type of fact-based qualified immunity decision that is not appropriate for interlocutory appeal"); *Rambo v. Daley*, 68 F.3d 203, 207 (7th Cir.1995) ("The essential dispute, therefore, concerns whether the plaintiff's version of the facts is true . . . . [T]he *Mitchell* exception does not allow us to hear [factual] disputes . . . ."); *Tamez v. City of San Marcos*, 62 F.3d 123, 125 (5th Cir.1995) (Because the lower court found "that genuine issues of material fact exist[ed] which preclude[d] summary judgment . . . . [W]e lack jurisdiction over [this] interlocutory appeal."); *see also Stella v. Kelley*, 63 F.3d 71, 75 (1st Cir.1995) ("[W]e lack the power to inquire into, or address . . . the fact-based question of what the evidence does (or does not) show concerning whether the [defendant's] actions violated the asserted right.").

In sum, rather than being consistent with out-of-circuit precedent, the panel opinion is distinctly out of sync. Indeed, the panel opinion appears to be the only circuit court opinion that has simply refused to follow the rule clearly enunciated in *Behrens* and *Johnson*.

The concurrence also mischaracterizes my views in several crucial respects. Neither I, nor any proper application of *Johnson* and *Behrens*, would allow "plaintiffs [to] assert some factual dispute — however irrelevant to the question of qualified immunity — to ensure themselves of a trial." Indeed, the factual disputes asserted by a plaintiff on appeal are meaningless under *Johnson* and *Behrens*. What matters is the *district court's assessment of the facts*. Rather than offering "an automatic trial" to plaintiffs who assert that "the police are lying," I simply follow the Supreme Court's mandate: when a district court denies summary judgment because of a purely factual question that decision is not immediately appealable.

This mischaracterization of my views by the concurrence demonstrates a fundamental flaw in its approach, it utterly disregards the critical role of district courts. It is the district court's job to assess the facts at summary judgment. The concurrence's suggestion that to follow *Behrens* and *Johnson*, as I do, would allow plaintiffs to make wild-eyed assertions that appellate courts would rubber-stamp on to trial ignores the fact that district courts must, and do, weed out almost all baseless claims. Although a district court may occasionally find disputes as to material fact that the concurrence does not fancy, the Supreme Court has made clear that an appellate court lacks jurisdiction to overturn such a decision; it is the district court's job to assess the sufficiency of evidence at summary judgment.

Finally, I must briefly respond to the charge of my colleagues joining in the concurrence that I would "require police officers to gamble with their lives in order to avoid civil liability" or "stand still and be shot." That rhetoric and the entire tenor of the opinion concurring in the denial of rehearing *en banc* unfairly and fundamentally mischaracterizes the basis for my dissent. I dissent not because I am unsympathetic to the frequently difficult choices police officers are called upon to make or because I want to deny them qualified immunity and force them to trial. Rather,

I dissent because Supreme Court precedent requires it. The Court has directed that when, as here, the only matter at issue is "whether the evidence could support a finding that particular conduct occurred" a district court's decision denying qualified immunity is not immediately appealable. *Behrens*, 116 S.Ct. at 842. Obeying the Supreme Court, as we are in any event bound to do, would neither require police officers to place their lives in peril, nor even necessarily require them to go to trial. All that it would do is eliminate an immediate appeal from a district court's denial of summary judgment on evidentiary sufficiency grounds.

Officers Leavitt and Cheney may ultimately be held entitled to immunity. The district court may even have erred in denying them immunity at this juncture. But, unquestionably the basis for the district court's denial was its assessment that "the evidence could support a finding that particular conduct [Archie had no gun] occurred." *Id.* Equally clearly, the basis for the majority's decision to reverse is its assessment that the same evidence could *not* "support a finding" that this "particular conduct occurred." *Id.* *Behrens* and *Johnson* forbid an appellate court from making this reassessment on interlocutory appeal.

Fundamental to our existence as a free and democratic society is the principle that we are a nation in which no person — even a courageous police officer in the line of fire or a sympathetic appellate judge — is greater than the law. The Supreme Court has proclaimed the law here. We must follow it. When a panel refuses to do this and the case presents an important and reoccurring issue, as this case does, the *en banc* court should reconsider the case. I respectfully dissent from the refusal of the majority of the court to do so.

Judge Hall, Judge Murnaghan, Judge Ervin, and Judge Michael join in this dissent.

APPENDIX D

FILED: April 1, 1997

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 96-1150
(CA-93-4078-PJM)

DOROTHY C. ELLIOTT, Individually and as Co-Personal Representative of the Estate of Archie Elliott, III; ARCHIE ELLIOTT, JR., Individually and as Co-Personal Representative of the Estate of Archie Elliott, III,

Plaintiffs - Appellees,

versus

JASON LEAVITT, Police Officer for District Heights, MD,

Defendant - Appellant,

and

PRINCE GEORGE'S COUNTY, MARYLAND; DAVID B. MITCHELL, Prince George's County Policy Chief; WAYNE CHENEY, Police Officer; CITY OF DISTRICT HEIGHTS, MD; MICHAEL CONBOY, Police Chief for District Heights, MD,

Defendants.

ORDER

Appellee has filed a motion to the en banc Court for re-entry of judgment.

The Court vacates the judgment of reversal of November 8, 1996 and re-enters the new judgment reversing the judgment of the district court nunc pro tunc as of January 24, 1997.

Entered at the direction of Chief Judge Wilkinson for the Court.

For the Court,

/s/ Patricia S. Connor
Clerk

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND (GREENBELT)

DOROTHY C. ELLIOTT, et al.	:	CASE NO. PJM-
Plaintiffs	:	93-4078
	:	
v.	:	January 2, 1996
	:	Greenbelt,
PRINCE GEORGE'S COUNTY,	:	Maryland
MD., et al.	:	
Defendants	:	

. . o0o . .

TRANSCRIPT OF HEARING ON MOTIONS BEFORE THE
HONORABLE PETER J. MESSITTE
UNITED STATES DISTRICT COURT JUDGE

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* * * * *

THE COURT: . . . Basically, this is a case which alleges violation of Fourth Amendment rights, specifically the use of excessive force in the apprehension of the decedent, who was Archie Elliott, III. The basic allegations are that on or about June 18, 1993, Elliott was driving in Prince George's County, and his car was weaving and he was stopped by a police officer, Jason Leavitt, for defendant City of District Heights. And that apparently Elliott was ordered from the vehicle. He exited, he appeared to be drunk to the officer and he was given a series of road side sobriety tests which he did not pass, including the stumbling apparently on the turn and walk test. He was then hand cuffed with his hands behind his back and placed in the front of Leavitt's police cruiser with the seat belt around him and at least the window on the passenger side apparently where he was placed was closed. During that time of the apprehension, Leavitt had

radioed for backup, and Officer Cheney of the Prince George's County Police Department had responded to that call so that he was then on site at the time that the events that led up to the law suit occurred.

According to the statements by the defendants, if you will at this point, the two individual officers, while they were outside the cruiser, the decedent made a gesture with his hands still cu[ff]ed behind his back which appeared to them to be him pointing a gun in their direction through the closed window or on the opposite side of the closed window. This followed a pat down search executed by either or both of the officers in which no weapon had been retrieved. It also bears noting that at the time of the search and at the time of the firing of the bullets that followed that Elliott was dressed in cut-off baggy jeans with no shirt and no shoes.

The officers indicated that when they believed they saw a weapon in the hands of Elliott, either or both of them yelled, "Gun. Drop it." That there was no response and that in consequence they

had to open fire to protect their own safety. Apparently, there is also undisputed that some twenty-two rounds were fired by the officers, not by the decedent whose gun as it turned out had no ammunition in it, was unloaded. And it is on that factual predicate that the estate and the survivors of the decedent have brought this action in Federal Court tied to Civil Rights violations.

The motion for summary judgement, of course, raises the familiar standard of whether there is a genuine issue of material fact that should go forward leaving aside immunity issues for a moment. And the position of the defendants in the case is that there is no material issue of disputed fact that would permit this case to proceed at this point, arguing that the officers should be taken at their word as to what they believed reasonably to be happening. And that in the absence of any conflicting contradictory testimony, the case should not be permitted to go forward.

Plaintiffs' view are that given the inherent circumstances of the case, summary judgment should be denied.

It is true as a general proposition that apprehension by use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment. And the question of reasonableness of force is usually a question of fact for the jury. On summary judgment the Court may make a determination of reasonableness where viewing the evidence in light most favorable to the plaintiff, the evidence would compel the conclusion that the defendants' use of force was reasonable.

The question is whether there are some situations which are factually, inherently questionable enough that a Court would have to say that even though the facts as presented uncontradicted by officers in this instance are as stated: could a trier of fact ultimately disagree with these? I understand that there is a difficult proposition beneath this in the sense, that it seems to be, at least arguably, that every officer's action could be second guessed on a credibility grounds. But —

It has also been said - and there's a case from the Ninth Circuit, the only one that I could find on this point, Hopkins versus

Andia (phonetic), 958 F.2d 881, a 1992 case from the Ninth Circuit, which involved just this situation where excessive force was used by officers where there really wasn't anyone to say that the number of shots fired in a killing had resulted in the use of excessive force. And the Ninth Circuit there concluded that given the particularly unusual circumstances of that case, that the matter should not be decided on summary judgment, but should go forward to a jury.

Among other things - although I understand it's difficult to find propositions to this effect, they quote Abraham Lincoln, who once said, "We better know that there's a fire once we see much smoke rising than we could know it by one or two witnesses swearing to it. The witnesses may commit perjury but the smoke cannot."

Sometimes there are factual circumstances which are on their face improbable enough - not to say untrue - but improbable enough that they do raise issues of fact that a reasonable trier could differ on. I, as the Judge making a preliminary ruling on this, look

at the fact that you have someone who is stopped for, if you will, a drunk driving, not the most heinous offense that might be noted in a situation where he clearly is drunk, in a situation where he is dressed in such a way as not likely to have a weapon, although he may well indeed have had one. Someone who is searched by an officer, who one would think if he's presumed to have acted regularly, might have found the weapon and did not, who is then hand cuffed in a vehicle with his hands behind his back with two officers on the outside of the vehicle, who then allegedly goes for a weapon, and arguably it's not clear what he's intending to do with the weapon except perhaps move his hands around and be threatening, but the officers on the outside certainly don't have to go on the inside; they can move farther away. When one considers all the options that are here and that were inherent and that were available at the time, certainly it could be argued that the actions of the officers here were not as they stated; that there is a significant issue of credibility. Now it may well be that the officers are telling the truth, and I don't presume that one way or

another to say that they weren't except that one can say, I think fairly, under these circumstances there are enough circumstances that a judge making this as a preliminary call could say that a reasonable trier of fact could come to a conclusion that things simply did not happen as the officers said they did. And under those circumstances I don't think that I am able at this point to grant summary judgment on the grounds of the non-existence of a genuine issue of material fact. There are significant issues of material fact that are present in this case, given the unusual circumstances of the way it occurred. So to that extent, the motion is not well taken.

Now to move to the second point, the qualified immunity point. It doesn't take a lot more, it seems to me, to say that on these facts, assuming that the plaintiffs' version, if you will, is agreed upon, that the actions of the officers were such that objectively speaking a reasonable officer similarly situated would not have understood that what was going on in here was wrong. I don't know that I even averted earlier to the fact of the twenty-

two shots, but frankly that's a significant item, too, about whether what went on, in fact did go on; but if it did, whether under all the circumstances, it was objectively reasonable. So I don't find that there's a qualified immunity defense that's available as a matter of law at this point either, and the case will have to proceed beyond that.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

DOROTHY C. ELLIOTT, et al.	*	
	*	
Plaintiffs	*	
	*	Civil No.
v.	*	PJM 93-4078
	*	
PRINCE GEORGE'S COUNTY, MARYLAND, et al	*	
	*	
Defendants	*	

ORDER

Upon consideration of the Motion for Summary Judgment filed by Defendants District Heights, Conboy and Leavitt, and the Motion for Summary Judgment of the Defendant Cheney, and Plaintiffs' Oppositions thereto, it is for the reasons stated on the record this 2nd day of January, 1996

ORDERED that said Motions are hereby GRANTED IN PART, DENIED IN PART, and DEFERRED IN PART as follows:

1) Summary judgment is hereby GRANTED in favor of

all Defendants and against all Plaintiffs with regard to Count V of the Complaint;

2) Summary judgment is GRANTED in favor of Defendants District Heights and Conboy with regard to Count I of the Complaint;

3) With regard to the Defendants that remain in Count I, summary judgment is GRANTED in favor of said Defendants with regard to any claim by Plaintiffs for medical expenses or lost wages (present or future); summary judgment is DEFERRED with regard to Plaintiffs' claims for pain and suffering; and in all other respects Defendants' Motions for Summary Judgment as to Count I are hereby DENIED; and it is further

ORDERED that, pursuant to Fed. R. Civ. P. 36(b), Plaintiffs are hereby authorized to withdraw any admission to the effect that punitive damages are not sought in this case.

/s/

PETER J. MESSITTE
UNITED STATES DISTRICT JUDGE

No. 96-1714

Supreme Court, U.S.
FILED
MAY 29 1997
CLERK

In The

Supreme Court of the United States

October Term, 1996

DOROTHY C. ELLIOTT and ARCHIE ELLIOTT, JR., as Representatives of the Estate of Archie Elliott, III,

Petitioners,

vs.

JASON LEAVITT and WAYNE CHENEY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

The question presented is whether this Court's holding in *Johnson v. Jones*, 115 S. Ct. 2151 (1995), as explained in *Behrens v. Pelletier*, 116 S. Ct. 834 (1996), that a United States District Court's finding on motion for summary judgment, that there is a genuine question of fact to be resolved at trial, absolutely bars a police officer's right to an interlocutory appeal, and concomitantly deprives the officer of qualified immunity, where plaintiff demonstrates no material evidence whatsoever that would be admissible at trial, as required by Federal Rule of Civil Procedure 56(c), to support a speculative theory that is contradicted by the admissible, corroborated evidence demonstrated by the police officers, but instead plaintiff simply challenges the credibility of the uncontroverted evidence as "inherently improbable."

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Respondents respectfully request that the Court deny the petition for writ of *certiorari* seeking review of an opinion of the United States Court of Appeals for the Fourth Circuit. The court of appeals opinion is reported at 99 F.3d 640 (4th Cir. 1996), *suggestion of rehearing en banc denied*, 105 F.3d 174 (1997). (For the Court's convenience, all citations to the opinions below will be to the opinions attached as appendices to the petition.)

STATEMENT OF JURISDICTION

Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1). Jurisdiction in this Court is barred by 28 U.S.C. § 2101(c), however, because the petition for writ of *certiorari* was not timely filed and no application to extend the time for filing a petition for writ of *certiorari* was made to this Court as provided by Rule 13. The question of this Court's jurisdiction to entertain the petition for writ of *certiorari* is argued as a threshold issue below.

STATUTE INVOLVED

28 U.S.C. § 2101 provides in relevant part:

> (c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

> (d) The time for appeal or application for a writ of certiorari to review the judgment of a State court in a criminal case shall be as prescribed by rules of the Supreme Court.

STATEMENT OF THE CASE

Petitioners begin their statement of the case by representing themselves as "a state court judge and a schoolteacher." The status of Petitioners, other than as personal representatives of the estate of the Archie Elliott, III, is not relevant, nor was it in evidence before the district court when it decided this case.[1] Petitioners continue their effort to misdirect the Court by inflating facts that, while undisputed, were not relevant to the pertinent inquiry and by omitting other undisputed facts that were material to the decision below.

A. District Court Proceedings

The district court denied qualified immunity to Respondents solely because it found that it was "factually, inherently questionable" that Elliott could have pointed a gun at the police officers while seated with his hands cuffed behind his back. (A.43[2]). It so held, despite the fact that it expressly found evidence that Elliott "made a gesture with his hands still cu[ff]ed behind his back which appeared to [the officers] to be him pointing a gun in their direction," (A.41) and that the officers "believed they saw a weapon in the hands of Elliott." (A.41).

The district court did not find any genuine dispute of

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1. There is also some question as to accuracy. It is Respondents' understanding that Archie Elliott Jr. is an administrative law judge, not a state court judge.

2. References to "A.[page]" are to the appendix to the petition.

material fact based on the uncontradicted evidence. Rather, it reasoned that the facts were so inherently improbable that even if uncontradicted by any evidence a trier of fact could "ultimately disagree" with them. (A.43). In other words, the district court found that a genuine dispute of material fact can be generated, and summary judgment defeated, merely because a jury could find the uncontroverted factual evidence was not credible. The district court came to this extraordinary conclusion despite the fact that the officers' testimony was corroborated by uncontroverted physical evidence.

Having concluded, erroneously, that it could not grant summary judgment in favor of Respondents on the merits, the district court summarily denied Respondents' motions for summary judgment based on grounds of qualified immunity. The district court failed to recognize that the qualified immunity analysis focuses on the moment when the decision to use force is made. *Graham v. Connor*, 490 U.S. 386, 396-97 (1989); *Drewitt v Pratt*, 999 F.2d 774, 778-79 (4th Cir. 1993); *Greenidge v. Ruffin*, 927 F.2d 789, 792 (4th Cir. 1991). Whether the preceding pat-down was adequate is not relevant to the qualified immunity analysis; nor was the fact, determined after the shooting, that the gun Elliott had pointed at the officers was not loaded.

Based on the uncontroverted evidence that "the decedent made a gesture with his hands still cu[ff]ed behind his back which appeared to them to be him pointing a gun in their direction," (A.41) Respondents were entitled to qualified immunity, as a matter of law because a reasonable police officer confronted with a person who appeared to him to be pointing a gun in his direction could believe that his use of deadly force was lawful.[3] *Anderson v. Creighton*, 483 U.S. 635, 641 (1987).

3. Petitioners argue that Respondents do not contend merely that they

(Cont'd)

The district court's rationale for refusing to grant qualified immunity can only be characterized as judicial "Monday morning quarterbacking." Having recognized uncontroverted evidence that the officers perceived a gun (A.41), the district court opined,

> arguably it's not clear what [Elliott was] intending to do with the weapon except perhaps move his hands around and be threatening, but the officers on the outside certainly don't have to go on the inside; they can move farther away. When one considers all the options that are here and that were inherent and that were available at the time, certainly it could be argued that the actions of the officers here were not as they stated; that there is a significant issue of credibility. . . .

(A.45-46). There was no evidence before the district court of any "options" to these officers who, the evidence showed, at least *perceived* Elliott to be moving a gun around "be[ing] threatening." (A.45). The officers reasonably could have believed their actions were lawful under the uncontroverted material facts, that is, the facts within their knowledge at the moment of the shooting. *Creighton*, 483 U.S. at 640-41; *Graham*, 490 U.S. at 396-97.

(Cont'd)
perceived that Elliott had a gun, but rather that Elliott in fact had a gun. Petition at 8 n.4. The distinction is irrelevant. At the very least, the district court found evidence that the officers in fact perceived a deadly threat. Nothing in the transcript suggests that the district court gave any credence to Petitioners' unsubstantiated, self-serving speculation that the officers "planted" a gun on Elliott after the shooting. (A.39-47).

B. Uncontroverted Facts

The uncontroverted facts in this case revealed that Officer Leavitt of the District Heights, Maryland, Police Department, while on patrol (R.14[4]), observed a vehicle operated by a man later identified as Archie Elliott, III, (hereinafter "Elliott") being driven on the wrong side of the road, swerving, overcompensating for oncoming traffic, and otherwise driving erratically.[5] (R.21-22[6]). Officer Leavitt initiated a traffic stop. (R.23,25). Elliott was very, very nervous and kept looking at Officer Leavitt's weapon and calling Officer Leavitt "lover." (R.27-28). Elliott reeked of alcohol and appeared to Officer Leavitt to be on a controlled dangerous substance, possibly PCP.[7] (R.28) Elliott's behavior made Officer Leavitt nervous. (R.28-29).

Officer Leavitt called for back-up, advising the dispatcher that he had a drunk driver whom he believed to be on drugs. (R.30-31, 137-38[8]). Elliott could not perform field sobriety tests. (R.29-30,33-35). Elliott was taller than Officer Leavitt, and while

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4. References to "R.[page]" are to the Joint Appendix filed in the court of appeals.

5. This was the fifth incident known to Elliott's mother involving her son's driving while under the influence of alcohol. (R.95).

6. Record pages 7-77 contain excerpts from the deposition of Officer Leavitt.

7. The autopsy revealed that Elliott had a blood alcohol level of between .20 and .28%, which is twice the level considered as being intoxicated for driving purposes in Maryland. (R.96, 113-17, 132).

8. Record pages 134-91 contain excerpts from Officer Cheney's deposition.

the field sobriety tests were being administered Elliott behaved aggressively, reaching into the front of his pants and walking up close to the officer. (R.71-75, 131[9]). Elliott's behavior and aggressive demeanor caused Officer Leavitt, whose requested back-up had not yet arrived, to avoid unnecessary physical contact with Elliott. (R.73).

Respondents' expert on police procedures opined that individuals who are impaired through their use of alcohol often present a greater danger to police personnel because of their impaired judgment. (R.195[10]). Petitioners identified no expert witnesses on any issue, medical or liability, and relied instead on their unsupported, self-serving conclusions that Elliott was too intoxicated to have pulled a gun on the officers.

Officer Leavitt arrested Elliott, who did not resist, handcuffing his hands behind his back and double-locking the handcuffs so that they would not tighten further. (R.36-37). Officer Leavitt briefly patted Elliott down and found no contraband. (R.37). While he remembered checking the back of Elliott's body, Officer Leavitt could not recall whether he checked the front, nor did he remember whether he felt into Elliott's pockets or patted down the pockets. (R.38-39, 50). Because of Elliott's behavior, Officer Leavitt was more concerned with physically securing Elliott in the cruiser promptly and getting him to the station than he was with thoroughly searching Elliott (R.42-43, 48-49, 73-74), who was clothed only in baggy jean shorts and shoes without socks. (R.31, 144, 154, 155).

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9. Record pages 130-33 contain excerpts from Petitioners Response to Request for Admissions.

10. Record pages 192-228 contain the affidavit and report of Kevin Parsons, Ph.D., Respondents' expert on police procedures.

Officer Cheney of the Prince George's County, Maryland, Police Department responded to Officer Leavitt's call for back-up regarding a vehicle occupant who was, according to dispatch, drunk or on some type of drug. (R.138). Officer Cheney arrived as Officer Leavitt was about to place Elliott into his cruiser. (R.41, 139). He assisted Officer Leavitt by getting into the driver's side of the cruiser, moving some objects to the back seat and unlocking and opening the passenger door. (R.41, 148-49, 150). Officer Cheney did not notice any weapons in the cruiser. (R.191). Officer Leavitt put Elliott in the passenger seat of the cruiser, put the seatbelt on him, and closed and locked the door. (R.44, 131, 150-51). The passenger window was closed. (R.43-44, 47, 147, 152-53). To Officer Cheney, Elliott appeared upset with Officer Leavitt at the time. (R.150-51).

Respondents were standing by the passenger side of the cruiser when Sgt. Brown, Officer Leavitt's supervisor, arrived in response to the back-up call. (R.46, 160-62, 230, 235-39[11]). As Sgt. Brown approached, a movement inside the cruiser caught Officer Leavitt's attention. (R.51, 56-57, 164, 240-41). Officer Leavitt had a clear view into the front compartment of the cruiser. (R.47, 51, 242). When Officer Leavitt looked into the cruiser, he found himself staring down the barrel of a small revolver and saw Elliott's right index finger on the trigger. (R.51-52, 56-57, 58-59, 60-61, 70, 88, 89,[12] 245, 246-47). Elliott, who was very thin, had released his seatbelt and twisted his arms to the right part of his body, up and around the mid-section. (R.56-57, 67, 70). He was pointing the handgun directly at Respondents and appeared to be about to fire. (R.51, 52, 56, 57, 60-61, 70, 88, 89, 246-47). Officer Leavitt yelled, "Gun!", ordered Elliott to drop the gun, drew his service revolver and pointed it at Elliott.

11. Record pages 229-47 contain the sworn statement of Sgt. Brown.

12. Record pages 87-91 contain Officer Leavitt's answers to interrogatories.

(R.64, 241, 242-43). Elliott ignored the order, still leaning forward in the seat with his arms twisted around the right side of his body, pointing the gun at the officers with his index finger on the trigger. (R.64). Officer Leavitt moved his right foot back to give some distance from the gun prior to firing. (R.53-54).

Upon hearing Officer Leavitt yell, "Gun!", Officer Cheney drew his service weapon, and looked inside the cruiser. (R.164, 166). Officer Cheney, who also had a view of the inside of the cruiser (R.164-65, 242), also saw the gun, which Elliott held with both hands. (R.164, 166, 174, 249[13]). Elliott, who was still in handcuffs, was leaning toward the driver's side with the gun approximately in the right side of his lap, pointed at the window and directly at Officer Cheney, with his right index finger on the trigger. (R.172-75).

Sgt. Brown, who could not see into the cruiser, heard Officer Leavitt yell, "Gun!" and "Drop it!"; and seconds later, he observed Respondents shooting at the detainee in the cruiser. (R.242-43).

The shooting was over quickly. (R.183). Although twenty-two rounds were fired by the two police officers, neither officer fully discharged his weapon. Officer Leavitt's service weapon still held six rounds; and Officer Cheney's service weapon still held four rounds of ammunition following the shooting. (R.263-65[14]). Fourteen bullets penetrated Elliott's body. (R.96-111,[15] 132). Based on the nature and condition of the wounds, the

13. Record pages 248-50 contain excerpts from Officer Cheney's answers to interrogatories.

14. Record pages 263-65 contain the crime scene processing report prepared by CID.

15. Record pages 96-111 contain the autopsy report.

assistant medical examiner, Dr. Korell, testified that the time period from the first wound to the last was a matter of seconds. (R.128-29[16]). Dr. Korell also testified that one bullet caused injuries to the right fingertips and base of the thumb as part of a common wound path best explained, in her opinion, by Elliott's having held a hard object at the time the injuries were sustained. (R.96-111, 120-22). Elliott never dropped the gun. (R.66-67, 176, 186, 244).

Following the shooting, Officer Cheney opened the car door and retrieved the gun from Elliott. (R.67, 176, 186, 244). He placed the gun on the trunk of the cruiser. (R.67, 176, 177, 178, 186, 244, 251[17]). He then pulled Elliott, who was no longer wearing his seatbelt, out of the cruiser. (R.67-68, 184-89).

The evidence unit investigating the scene of the shooting recovered Elliott's gun, which had a small, blue fiber attached to the trigger. (R.263-65). Upon testing by the Federal Bureau of Investigation, it was determined that the fiber found on Elliott's gun came from Elliott's shorts. (R.270-72[18]). The internal affairs investigation revealed that a few months before the shooting Elliott had threatened a motorist with a handgun. (R.354-55[19]). That motorist, in a sworn statement, identified the

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16. Record pages 112-39 contain excerpts from Dr. Korell's deposition.

17. Record page 251 contains a photograph of the cruiser with Elliott's gun in the position where Officer Cheney placed it after retrieving it from Elliott's body.

18. Record pages 270-72 contain the FBI laboratory report of the fiber tests. The gun was not tested for fingerprints.

19. Record pages 352-55 contain the charging documents of the pre-shooting incident where Elliott threatened a motorist with a gun.

gun found on Elliott's body as the same gun with which Elliott had previously threatened him.[20] (R.356-58[21]).

The case was presented to the grand jury, which declined further action; and the homicide investigation was closed. (R.273[22]). An internal affairs investigation recommended that both officers be exonerated for the shooting.

In the face of these uncontroverted facts, Petitioners argued, based solely on bald assertions and self-serving speculation, unsupported by any evidence that would be admissible at trial, that it was "inherently improbable" that the shooting happened as revealed by the evidence because Elliott was seated with his hands cuffed behind him. Petitioners did not even offer expert testimony to support their theory.[23]

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20. Petitioners suggest in footnote 2 that this statement is not credible because it was given fifteen months after the shooting, but the evidence revealed that the incident report charging Elliott with threatening the motorist with a revolver was filed months before the shooting. (R.355).

21. Record pages 356-58 contain the sworn statement of the motorist identifying Elliott's gun and the affidavit of Officer R.F. Gheen, who took the statement.

22. Record page 273 contains a memorandum regarding the grand jury.

23. Respondents did offer evidence that the events were not "inherently improbable" in the form of expert testimony (R.195) and in the form of a letter from the FBI abstracting numerous specific incidents reported in the FBI publication *Law Enforcement Officers Killed and Assaulted*, where law enforcement officers have been assaulted or killed by offenders who had been restrained, including being seated with hands cuffed behind their backs. (R.345-53).

C. Court of Appeals Proceedings

The court of appeals panel correctly found, and the *en banc* court ultimately agreed, that it had jurisdiction to hear this interlocutory appeal "because it does not involve whether 'particular conduct occurred,' but rather an issue of law — whether uncontroverted conduct represented the use of excessive force. As to the material facts here, *there is no genuine dispute because plaintiff has come forward with no evidence*." (A.10 [citing *Behrens v. Pelletier*, 116 S. Ct. 834, 840 (1996)], *suggestion of rehearing en banc denied*, A.14). The distinction lost on the district court, but which the court of appeals recognized, is that this is not a case of "sufficiency" of evidence. In this case, Petitioners utterly failed to meet their burden under Federal Rule 56(c)of demonstrating the existence of evidence that would be admissible at trial, beyond mere speculation and conjecture to support their claims. *Anderson v. Liberty Lobby*, 477 U.S. 242, 252 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Petitioners merely challenged, without evidentiary support, the credibility of the uncontroverted evidence.

The significance of this distinction from *Johnson v. Jones*, 115 U.S. 2151 (1995), and *Behrens* was explained by the majority opinion of the *en banc* court in denying the suggestion for rehearing *en banc*: Denial of an interlocutory appeal where plaintiffs have not demonstrated any evidence, only speculation and conjecture, that " 'the police are lying' " would permit plaintiffs "to receive an automatic trial" in contravention of the principles established by *Mitchell v. Forsyth*, 472 U.S. 511 (1985), and its progeny, including *Johnson v. Jones* and *Behrens*. (A.17).

The judgment of the court of appeals was entered on November 8, 1996. (A.1). A timely petition for rehearing in the

court of appeals would have tolled the running of the time for filing a petition for writ of *certiorari*. Rule 13(3). Petitioners did not file such a petition, which would have been due November 22, 1996, Fed. R. App. P. 40(a), and the time for petitioning this Court was not tolled.

On December 2, 1996, after the time for petitioning for rehearing had expired, the court of appeals issued its mandate, which it recalled the same day when a member of the court requested a poll on whether the case should be heard *en banc*. (A.12). The court of appeals did not vacate its November 8, 1996, judgment by the December 2 order. (A.13). A divided *en banc* court denied the suggestion for rehearing *en banc* on January 24, 1997 (A.14); and the mandate was issued on February 3, 1997.

The time for filing a petition to this Court for writ of *certiorari* did not expire until February 6, 1997. Petitioners still had at least until January 27, 1997, under Rule 13(5), to request that this Court grant them an extension of time of up to sixty days to file their petition. Indeed, in extraordinary circumstances such as Petitioners contend exist in this case, the request for an extension of time could have been made later. Rule 13(5). Petitioners' counsel in the court of appeals proceeding is located in Washington, D.C.; so there were no geographic barriers to the timely filing of a request for extension of time. Nevertheless, no request for an extension of time was made by Petitioners.

Petitioners made no effort whatsoever to preserve their right to ask this Court to invoke its discretionary jurisdiction.

On or about March 17, 1997, more than one month after the time for filing a petition for writ of *certiorari* under this Court's Rules had lapsed, Petitioners filed a motion for re-entry

of judgment. Petitioners stated in their motion that its purpose was "to clarify the procedural significance of the court of appeals's unusual *sua sponte* actions" in vacating the mandate. On April 1, 1997, almost two months after the time for filing a petition for writ of *certiorari* had passed, the court of appeals vacated the November 8, 1996, judgment and re-entered it, without change, *nunc pro tunc* as of January 24, 1996, the day the court had filed its opinion denying the suggestion for rehearing *en banc*.

REASONS FOR DENYING THE WRIT

I.

THIS COURT LACKS JURISDICTION TO CONSIDER THE PETITION.

This Court lacks jurisdiction to entertain the petition under 28 U.S.C. § 2101(c), which provides in pertinent part as follows:

> any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review *shall* be taken or applied for within ninety days after *the entry of such judgment or decree*. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period *not exceeding* sixty days. [Emphasis added.]

Missouri v. Jenkins, 495 U.S. 33 (1990). Unlike criminal cases, where Congress provided for exercise of the Court's discretionary jurisdiction "as prescribed by the rules of the Supreme Court," 28 U.S.C. § 2101(d), there is no discretion to

consider a petition for writ of *certiorari* in a civil action that is filed more than one hundred fifty (ninety plus sixty) days after entry of the judgment. The latest date on which Petitioners could have filed their petition was April 7, 1997, one hundred fifty days after the entry of judgment on November 8, 1996. Rule 13(2).

Petitioners cannot claim ignorance. The time for petitioning for review on *certiorari* is clearly set forth in Rule 13(1):

> Unless otherwise provided by law, a petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort or a United States court of appeals . . . is timely when it is filed with the Clerk of this Court within 90 days after *entry of the judgment*. . . . [Emphasis added.][24]

The time for filing a petition for writ of *certiorari* expired on February 6, 1997, without any action by Petitioners.

Petitioners could timely have filed a petition for rehearing, which would have tolled the time for petitioning this Court for a writ of *certiorari*. Rule 13(3). They did not file such a petition.

Petitioners could timely have filed a request for an extension of time within which to petition for writ of *certiorari* after the court of appeals denied the suggestion for rehearing *en banc* on January 24, 1997. Rule 13(5). A request for extension could have been sought at least as late as January 27, 1997, and possibly later based on "extraordinary circumstances." Rule

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24. *Compare* Md. Rule 8-302 (requiring filing of petition for *certiorari* to state's highest court "not later than 15 days after the Court of Special Appeals issued its *mandate*") [emphasis added].

13(5). Petitioners did not request an extension, and the time for petitioning for a writ expired without any action on Petitioners' part.

Instead of availing themselves of the ample opportunities under the rules to protect themselves, Petitioners chose to do nothing. Petitioners may have been confused by the uncertainty created when the court of appeals withdrew its original mandate in December, but they took an unnecessary and unwarranted risk when they took no action either to file their petition for writ of *certiorari* by February 6, 1997, or to request an extension of time to file such petition.

Petitioners waited until March 17, 1997, more than a month after the court of appeals had issued its mandate, to request that the court of appeals vacate its four-month-old judgment and give Petitioners another "bite at the apple." The excuse offered for their dilatory action was that the court of appeals' withdrawal of its mandate and *sua sponte* suggestion for rehearing *en banc* was so unusual that Petitioners were uncertain of when the time for filing a petition expired. They made no attempt to excuse their failure to follow the rules of this Court to protect themselves, nor did they cite any authority by which the court of appeals had the power to manufacture jurisdiction in the Supreme Court by manipulating the entry of judgment.[25]

Moreover, Rule 13(3) could not have been more clear: "A suggestion for rehearing *en banc* is *not* equivalent to a petition for rehearing within the meaning of this rule unless so treated by the United States court of appeals." [Emphasis added.] If the

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25. None of the cases cited by Petitioners supported the arguments made in their motion for re-entry of judgment. Four cases involved proceedings where a party had in fact filed a petition for rehearing, and five more were criminal cases where considerations of due process and the right to effective assistance of counsel mandated the results.

suggestion for rehearing *en banc* was the anomaly Petitioners claim, there would not be an express provision in the Court's rules to cover it.

Whether, as Petitioners claim, the court of appeals mistakenly believed that withdrawal of the mandate would toll the time for filing a petition for writ of *certiorari*, Petition at 14 n.5 (citing *Moore v. United States*, 360 F.2d 353, 357 n.1 (4th Cir. 1965), *cert. denied*, 385 U.S. 1001 (1967)), the fact remains that the court of appeals did not treat the *sua sponte* suggestion for rehearing *en banc* as a petition for rehearing under Supreme Court Rule 13(3), thereby tolling the time for filing a petition for writ of *certiorari*. The court of appeals made no mention in its order withdrawing the mandate that it intended to stay the tolling of the time for petition for *certiorari*. The court of appeals acted promptly on the suggestion, especially considering the degree of disagreement within the court, and filed its denial before the expiration of the time for filing a *certiorari* petition, and also within the time permitted to request an extension of time to petition for writ of *certiorari* under Rule 13(5). Indeed, the mandate was issued prior to the expiration of the time for filing a petition for writ of *certiorari*.

Petitioners' motion for re-entry of judgment was filed more than thirty days after entry of the mandate. Therefore, the court of appeals no longer had any jurisdiction over this case. *Boston and Maine Corp. v. Town of Hampton*, 7 F.3d 281, 282 (1st Cir. 1993); *Johnson v. Bechtel Assoc. Prof. Corp.*, 801 F.2d 412, 415 (D.C. Cir. 1986); *United States v.DiLapi*, 651 F.2d 140, 144 (2nd Cir. 1981), *cert. denied sub nom., Ladmer v. United States*, 455 U.S. 938 (1982). The court of appeals had no jurisdiction to vacate and reissue its judgment *nunc pro tunc* on April 1, 1997, because its mandate had issued on February 3, 1997. Even assuming arguendo that the court of appeals had the power to do so, the court did not withdraw its mandate prior to vacating

and re-entering the judgment. The April 1, 1997, order is a nullity.

This Court does not have jurisdiction to entertain the petition. Even if discretionary jurisdiction did exist, the Court should deny the petition in view of Petitioners' utter disregard of this Court's rules.

II.

THE COURT OF APPEALS DECISION DOES NOT CONFLICT WITH *JOHNSON v. JONES* OR *BEHRENS.*

In *Johnson v. Jones*, 115 S. Ct. 2151 (1995), this Court held that a denial of summary judgment on grounds of qualified immunity is not immediately appealable when the appeal simply challenges the factual conclusion that the record reveals a genuine issue of material fact and raises no legal issue as to the claim of qualified immunity. In that case, the Court sought to stem the tide of automatic interlocutory appeals where summary judgment based on qualified immunity was denied based solely on factual evidentiary disputes. *Johnson*, 115 S. Ct. at 2159.

It soon became apparent that the opinion in *Johnson v. Jones* was being interpreted too broadly by the circuit courts of appeals, which cited it in denying interlocutory appeals on grounds of qualified immunity in virtually every case where the district court had found a question of fact. In *Behrens v. Pelletier*, 116 S. Ct. 834 (1996), this Court rejected the broad interpretation of *Johnson v. Jones* being espoused in the circuits:

> [R]espondent asserts that appeal of denial of the summary-judgment motion is not available because the denial rested on the ground that "[m]aterial issues of fact

> remain." This, he contends, renders the denial unappealable under last Term's decision in *Johnson v. Jones. That is a misreading of the case.* [Citation omitted; emphasis added.]

Both *Behrens* and *Johnson v. Jones* clearly hold that a denial of qualified immunity is immediately appealable "to the extent it turns on an 'issue of law'." *Behrens*, 116 S. Ct. at 841 (quoting *Mitchell v. Forsyth*, 472 U.S. at 530); *Johnson v. Jones*, 115 S. Ct. at 2156.

The instant case is not simply another case where a defendant attempts to circumvent a trial that is necessary to resolve genuine factual issues upon which a finding of qualified immunity depends. This case involves a question of law. The sufficiency of the evidence to support a *prima facie* case is first a question of law for the court. Typically, a district court's determination as to sufficiency of evidence involves the weighing of evidence on both sides of a scale, which under *Johnson v. Jones*, should not be considered on interlocutory appeal.

By contrast, this case turns on the threshold purely legal question whether Petitioners met the burden imposed upon them by Fed. R. Civ. Proc. 56(c) to demonstrate the *existence* of evidence to establish each essential element of their case on which they will bear the burden of proof at trial. *Celotex v. Catrett*, 477 U.S. 317, 322-23. Petitioners could not meet that burden by any evidence material to the qualified immunity analysis. That is, they offered no evidence, only self-serving speculation and conjecture, to controvert the evidence that at the moment Respondents shot Elliott they could have believed he had a gun pointed at them and that their use of deadly force was lawful. *Creighton*, 483 U.S. at 640-41; *Graham*, 490 U.S. at 396-97; *Greenidge*, 927 F.2d at 792.

However strenuously Petitioners argue that the uncontroverted facts are "inherently improbable," the fact remains that they could not fulfill their burden on summary judgment to refute the evidence demonstrated by Respondents with evidence that would be admissible at trial. Fed. R. Civ. Proc. 56(c). As this Court recognized in *Celotex*, "there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial." *Celotex*, 477 U.S. at 322-23.

In opposing summary judgment, Petitioners were required to "do more than simply show there is some metaphysical doubt as to the material fact." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Nevertheless, Petitioners contended, and the district court agreed, that merely raising the issue of credibility of Respondents could defeat summary judgment. (A.43). They demonstrated no evidence to support their claim that Respondents were lying, as the plaintiffs had in *Hopkins v. Andaya*, 958 F.2d 881 (9th Cir. 1992), *cert. denied*, 115 S. Ct. 1097 (1995) (the only case cited by the district court to support its legal ruling).[26] Petitioners did not even demonstrate evidence that would be admissible at trial to support their claim that the facts supported by the evidence were "inherently improbable," although Respondents demonstrated evidence that they were not "inherently improbable."

Even if it were appropriate to deny summary judgment merely because the only evidence is derived from testimony of

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26. In *Hopkins*, unlike the instant case, there was *evidence* to *contradict* the police officer's testimony: the officer's testimony contradicted what the hospital records revealed he had told the hospital personnel immediately after the incident; and the court found not one, but two separate shootings several minutes apart which contradicted the officer's claim of exigency. *Hopkins*, 958 F.2d at 885-86.

the defendant — and it is not — this is not such a case. Respondents' testimony was corroborated both by testimony of others and by physical evidence. Sgt. Brown, while he could not see into the car, could see the shooting, and he observed Officer Cheney retrieve the gun from Elliott's body and place it on the trunk of the cruiser; there was a photograph taken at the scene of the bloody gun on the trunk of the cruiser; there was testimony from the medical examiner and an autopsy report establishing that Elliott was holding a hard object in his right hand when he was shot; there was a lab report tying the fiber from the gun to Elliott's pants; there was even a witness who testified that a few months before the shooting Elliott had threatened him with the same gun. As Chief Judge Wilkinson observed, "If qualified immunity does not obtain here, it will not obtain anywhere." (A.17).

Recently, the Court of Appeals for the Fourth Circuit considered this issue again in *Jackson v. Long*, 102 F.3d 722 (4th Cir. 1996).[27] *Jackson v. Long* involved a claim by prison officials of deprivation of property interest in employment and stigmatizing discharge against a sheriff who terminated their employment after reports that one of the officials had raped an inmate. Judge Niemeyer explained the court's reasoning for taking interlocutory jurisdiction over the appeal as follows:

> In the case before us, the district court was troubled by whether [plaintiffs] actually participated in the conduct for which the announced investigation placed them under suspicion. It concluded that factual questions existed about whether the assault occurred and whether, when charges were dropped, the plaintiffs were stigmatized. While these may

27. Judge Motz served on the panel in this case and concurred in the judgment only.

be disputed factual questions, they are not material to the abstract question of Sheriff Long's immunity, which depends on whether Sheriff Long violated clearly established constitutional rights and whether he reasonably should have so known. The facts which are relevant for determining whether Sheriff Long has immunity must be taken from the viewpoint of Sheriff Long at the time he terminated the jailers and not of an independent factfinder looking later in hindsight at whether the assault actually occurred or whether Sheriff Long proved to be right in his decisions. No factual question was raised about whether Sheriff Long reasonably believed that sufficient facts existed to initiate an investigation or that he could, as a matter of law, dismiss [plaintiffs] as at-will employees.

Since the facts relevant to the nature of the complaint presented to Sheriff Long and his response are not in dispute, we are left with the legal questions of whether Sheriff Long's response violated clearly established constitutional rights and, if so, whether Sheriff Long reasonably should have known that it did. This posture of undisputed facts about Sheriff Long's belief is precisely that which enables us to resolve immunity, as we should, before trial "at the earliest possible stage of a litigation." See *Anderson v. Creighton,* 483 U.S. 635, 565 n.6 []. This is important because qualified immunity is "an entitlement not to stand trial or face the other

> burdens of litigation." *Behrens*, 116 S. Ct. at 838 (quoting *Mitchell*, 472 U.S. at 526).

102 F.3d at 727; *accord Winfield v. Bass*, 106 F.3d 525, 530 (4th Cir. 1997) (appellants pressed "the legal issue of whether the undisputed facts disclose that reasonable officers would have understood that their conduct violated Winfield's clearly established legal rights" as opposed to merely arguing insufficiency of the evidence) (J. Motz, concurred in this opinion as well).

Like the district court in *Jackson v. Long*, the district court in this case found a factual dispute based on issues irrelevant to the qualified immunity inquiry. It questioned whether it was "inherently improbable" that Elliott had a gun based on the question whether the earlier pat-down was adequate and the later discovery that Elliott's gun was not loaded. Those factors were not relevant to the police officers' decision, when they perceived Elliott holding a gun pointed at them with his finger on the trigger, to meet that threat with deadly force. The district court did not find a dispute of fact as to whether the gun was in Elliott's hands. Rather, the court disputed whether the officers' reaction to the perceived threat was reasonable in view of the fact that Elliott had been patted down earlier and his gun was not loaded.[28] The reasonableness of the officers' action is precisely the legal analysis for qualified immunity — whether a reasonable officer under the same circumstances would have understood he was acting unlawfully — and it is reviewable *de novo* immediately on appeal.

The court of appeals in this case correctly refused to deprive

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28. The court even went so far as to count the bullets, as if a reasonableness determination could be made based upon whether 22 bullets or some lower number had been fired in the seconds during which the shooting occurred. (A.46-47).

Respondents of an interlocutory appeal where, after discovery had been closed, Petitioners could not demonstrate on summary judgment, as a threshold issue of law, any relevant dispute of fact to contradict the corroborated evidence that the police officers at least perceived that Elliott had a gun pointed at them with his finger on the trigger and were reasonable in meeting that threat with deadly force. That holding logically flows from the reasoning of *Johnson v. Jones* and *Behrens* and espouses the consideration underlying those cases to deter interlocutory appeals where a trial is necessary to resolve genuine issues of material fact without, as Petitioners urge, sacrificing the important public policies set forth by this Court in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), *Mitchell v. Forsyth*, and their progeny.

III.

THE FOURTH CIRCUIT IS NOT BOUND BY DECISIONS OF OTHER CIRCUITS.

In her passionate dissent to the denial of suggestion for rehearing *en banc*, Judge Motz argued that the court of appeals should ignore the threshold issue of law present in this case and the precedent and public policies underlying *Harlow* and *Mitchell* merely because other circuits have broadly applied *Johnson v. Jones* as a blanket bar to all interlocutory appeals based on qualified immunity where the district court found a dispute of fact. Obviously, the fourth circuit court of appeals is not required to interpret every case exactly the way every other circuit interprets it.

This case presents the exceptional situation, apparently either not encountered or not perceived by the other circuits, where a plaintiff failed, as a matter of law, to meet defendants' evidence on summary judgment with a showing of contravening

evidence that would be admissible at trial as required by Fed. R. Civ. Proc. 56(c). Certainly, the court of appeals cannot be faulted for recognizing that in this case, as a matter of law, Petitioners have not met their burden on summary judgment and that it would be the height of injustice to deny Respondents qualified immunity.

As *Behrens* has demonstrated, a blind application of *Johnson v. Jones* to bar every immediate appeal of denial of qualified immunity was never this Court's intent. "*Every* denial of summary judgment ultimately rests upon a determination that there are controverted issues of material fact. . . ." *Behrens*, 115 S. Ct. at 842 [emphasis in original]. Half of the cases canvassed by Judge Motz to support her dissenting opinion were decided before *Behrens*, and none of them considered *Behrens* in their reasoning. *Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996); *Shinault v. Cleveland County Bd. of County Comm'rs*, 82 F.3d 367, 369 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 740 (1997); *Woolfolk v. Smith*, 81 F.3d 741, 743 (8th Cir. 1996); *Rambo v. Daley*, 68 F.3d 203, 207 (7th Cir. 1995), *cert. denied*, 116 S. Ct. 1546 (1996); *Tamez v. City of San Marcos*, 62 F.3d 123, 125 (5th Cir. 1995); and *Stella v. Kelley*, 63 F.3d 71, 75 (1st Cir. 1995).

The court of appeals appropriately recognized the distinction between the existence of evidence and mere speculation and conjecture, and correctly held that speculation and conjecture are not sufficient to deprive defendants who have been denied qualified immunity of an immediate appeal.

CONCLUSION

Because the petition was not timely filed, this Court lacks jurisdiction to grant a writ of *certiorari* to the court of appeals in this case. Even if jurisdiction existed, the petition should be

denied because of Petitioners' utter disregard of the Court's Rules.

The petition should be denied on the additional basis that there is no compelling reason to grant it. It is a correct interpretation of *Johnson v. Jones* and *Behrens*, and a logical extension of their reasoning and the balance sought by this Court to be achieved between them and the important public policy considerations underlying *Harlow* and *Mitchell v. Forsyth*.

The writ of certiorari should be denied.

Respectfully submitted,

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In the
Supreme Court of the United States

October Term, 1996

DOROTHY C. ELLIOTT AND ARCHIE ELLIOTT, JR.,
AS REPRESENTATIVES OF THE ESTATE OF ARCHIE ELLIOTT, III,
Petitioners,

v.

JASON LEAVITT AND WAYNE CHENEY,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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INTRODUCTION

The only issue before the court of appeals was the correctness of the district court's determination that there was a genuine issue of fact for trial on respondents' claim of qualified immunity. That court consequently lacked jurisdiction under this Court's decisions in *Johnson* v. *Jones*, 115 S.Ct. 2151 (1995), and *Behrens* v. *Pelletier*, 116 S.Ct. 834 (1996). Respondents have said nothing that can justify the assertion of jurisdiction by the court of appeals in this case.

Without a strong argument on the merits against summary reversal, and with the remarkable suggestion that not even intercircuit conflict on the basic issue of appellate jurisdiction raised by the petition need trouble this Court, Respondents' Brief in Opposition ("Opp. Cert.") 23, respondents rely most heavily on the contention that this Court lacks jurisdiction to entertain the petition for certiorari in this case. This is a red herring. Under well-settled law, this Court has jurisdiction to hear this case. And indeed, in order to make sure that there could be no debate about this point, petitioners sought, and were granted, an order of the court of appeals that, under the rules articulated in this Court's precedents, ensures that the petition in this case is timely, even if it otherwise would not have been.

ARGUMENT

1. Respondents concede the rule, Opp. Cert. 18, which is in any event clear: Where summary judgment on grounds of qualified immunity is denied on a "purely legal" ground "separable" from the merits of the plaintiff's claim, the court of appeals has jurisdiction to hear an immediate appeal of the district court's ruling. *Johnson* v. *Jones*, 115 S.Ct. at 2155-57. Where such a denial turns only on a "determination that there is a genuine issue of fact" for trial, 115 S.Ct. at 2159, it does not. See *Behrens*, 116 S.Ct at 842.

Respondents now claim, however, that the question before the court of appeals was the "purely legal" — and thus immediately appealable — one whether a police officer who in fact was, or believed himself to be, threatened with a gun as the officers here claimed, was entitled to qualified immunity. See Opp. Cert. 22-23. They claim that

> [t]he district court did not find a dispute of fact as to whether the gun was in Elliott's hands. Rather, the court disputed whether the officers' reaction to the perceived threat was

> reasonable in view of the fact that Elliott had been patted down earlier and his gun was not loaded.

Opp. Cert. 22.

This is demonstrably false. There has never been any dispute that, *if* Elliott had pointed a gun at the officers, or even if they erroneously *believed* he pointed a gun at them, their use of deadly force would have been objectively reasonable, and they would be entitled to qualified immunity. See Petition for Certiorari ("Cert. Pet.") 8. The district court did not conclude otherwise. The sole basis for its denial of summary judgment was that there was a genuine issue of material fact as to whether or not Elliott even held a gun at the time of the shooting. See Petition Appendix ("App.") A45-A46.[1] The district court denied summary judgment not because it believed respondents' actions might have been unreasonable even if there had been a perceived threat, but because "a reasonable trier of fact could come to a conclusion that things simply *did not happen* as the officers said." App. A46 (emphasis added).[2]

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[1] Despite the statement in respondents' brief (a statement with which petitioners agree) that an officer can lawfully defend himself against a person who "appear[s] to him to be pointing a gun in his direction," Opp. Cert. 3, respondents have never claimed that they only *mistakenly* believed that Elliott had a gun and was pointing it at them. Nor do they make that claim here. See Opp. Cert. 3-4 n. 3 (stating the distinction between claiming that the officers perceived that Elliott had a gun and claiming that Elliott actually had a gun "is irrelevant"). This would be a particularly difficult claim for the respondents to make after producing a gun that they claim Elliott was holding at the time of the shooting. The factual question in dispute in this case is not about reasonable-but-mistaken perception, but only about whether Elliott in fact held a gun at the time of the shooting.

[2] Respondents quote language from the district court describing how the officers might have responded if they had actually perceived Elliott to be holding a gun, App. A45, in order to suggest — falsely — that the district court concluded that the officers' use of force was unreasonable because even if the officers had actually perceived the threat they described, they still would not have had to use the *amount* of force they did. See Opp. Cert. 4. In context, however, it is plain that the district court was not second guessing the reasonableness of the officers' judgment, Opp. Cert. 4, 22, but was only suggesting that, in light of the limited threat that might have been presented

Respondents — seeking to characterize as "uncontroverted" the very facts that the district court found were in dispute — repeatedly suggest before this Court that the district court found as a fact that "the decedent made a gesture with his hands still cu[ff]ed behind his back which appeared to them to be him pointing a gun in their direction," see Opp. Cert. 2, 3 (both quoting App. A41); see also *id.* at 4 n. 3 ("At the very least, the district court found evidence that the officers in fact perceived a deadly threat."). Even a cursory reading of the opinion of the district court demonstrates, however, that the district court did *not* find that Elliott made a gesture that could have led the officers to believe he was pointing a gun at them. The sentence from which respondents extracted their quotation actually says: "*According to the statements by the defendants* . . . the decedent made a gesture with his hands still cu[ff]ed behind his back which appeared to them to be him pointing a gun in their direction . . . ." App. A41 (emphasis added).[3]

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by a handcuffed man in these circumstances, the *motive* for the shooting might not in fact have been self-defense at all — an additional evidence-based reason for doubting that the circumstances of Elliott's death were as the officers described. See App. A45; see also, *e.g.*, App. A32 (Motz, J., dissenting) ("a jury could infer that the firing of twenty-two bullets at a handcuffed man evinces a motive other than self-defense").

[3] This misrepresentation is typical of respondents' brief. Respondents describe as "uncontroverted" their own testimony — testimony which is drawn into question by other pieces of evidence in this case. See, *e.g.*, Opp. Cert. 7 (describing Elliott holding a gun); *id.* at 8 (same); *id.* at 9 ("Elliott never dropped the gun"); *id.* (referring to the recovered weapon as "Elliott's gun"). Respondents also attempt to bolster their case by mischaracterizing some of the other evidence in the record. Contrary to respondents' assertion, Sergeant Brown did *not* "observ[e] Officer Cheney retrieve the gun from Elliott's body." Opp. Cert. 20. His testimony is clear that he could not see the place from which Officer Cheney retrieved the gun, because Officer Cheney stood with his body blocking Sergeant Brown's view. See 4th Cir. App. 244-245. In addition, contrary to the suggestion of respondents, there was no testimony that Elliott released his seatbelt prior to the shooting. Opp. Cert. 7. Officer Leavitt testified that he secured Elliott in the police cruiser, 4th Cir. App. 44, and Sergeant Brown testified that, immediately before the shooting, Elliott appeared to be strapped in. 4th Cir. App. 238. The only testimony regarding release of the seatbelt came from Officer Cheney who testified that Elliott's

2. Respondents also argue that the court of appeals's assumption of jurisdiction in this case was justified because, even if the "purely legal" question described above was not presented on appeal, this case still "involves a question of law" inasmuch as "[t]he sufficiency of the evidence to support a *prima facie* case is first a question of law for the court." Opp. Cert. 18; see also *id.* (citing *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322-23 (1986)).

This argument, too, is unavailing, for this purported "purely legal" question is nothing more than the question whether there is a "genuine issue of material fact" — the very question that this Court ruled unanimously in *Johnson* is *not* "purely legal" and can *not* be reviewed at the summary judgment stage by way of interlocutory appeal.

Respondents suggest nonetheless that an appeal is permissible here because there was *no* evidence in the summary judgment record that called into question their testimony that Elliott was pointing a gun at them when they killed him. See Opp. Cert. 18-19. In this they repeat the court of appeals's own circular argument that it was somehow permitted to hear the appeal challenging the district court's determination that there was a "genuine" issue of fact for trial because it concluded that the district court was simply wrong in finding the facts to be "[c]ontroverted" by "any evidence." See App. A10.

But of course *Johnson* and *Behrens* apply to *all* claims that a district court erred in finding a "genuine" issue of material fact — even those claims asserting that the court made such an error in the face of a complete absence of evidence supporting the nonmoving party. Indeed, *Johnson* itself *holds* that the court of appeals lacks jurisdiction to hear an interlocutory appeal alleging only that summary judgment was wrongly denied because there is "no evidence" in the record to support the conclusion that there is a genuine issue of material fact as to qualified immunity. See *Johnson*, 115 S.Ct. at 2154 (defendant officers "argued, in relevant part, that the denial [of summary judgment] was wrong because the record

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body was not belted in when he went to remove it from the cruiser *after* he and Officer Leavitt killed Elliott. 4th Cir. App. 187. There is no reason to think that the seatbelt was not released, if indeed it was released at all, by the barrage of gunfire fired at Elliott from point-blank range.

contained 'not a scintilla of evidence . . . that one or more' of them had 'ever struck, punched or kicked the plaintiff, or ever observed anyone doing so.'") (citation omitted). In asserting jurisdiction to determine whether there was a "genuine dispute" "[a]s to the material facts," App. A10, the court of appeals simply defied this Court's decisions in *Johnson* and *Behrens*.

The claim that the summary judgment record contains "no evidence" supporting petitioners is, furthermore, as demonstrably wrong factually as it is immaterial legally. For this is *not*, as respondents assert repeatedly, a case in which the denial of summary judgment depended on nothing more than the view that, in some purely "metaphysical" sense, Opp. Cert. 19, the "uncontroverted evidence [was] 'inherently improbable.'" Opp. Cert. i (Question Presented). Nor did the district judge rely on petitioners' "merely raising the issue of credibility," Opp. Cert. 19, or on "self-serving speculation and conjecture." Opp. Cert. 18.

On the contrary, as the district court opinion makes clear, the district judge found that "[t]here are significant issues of material fact that are present in this case," App. A46, based upon the physical and other evidence in the summary judgment record, see, *e.g.*, App. A45 (observing that Elliott was "hand cuffed in a vehicle with his hands behind his back"); *id.* (observing that Elliott had been "searched by an officer, who one would think if he's presumed to have acted regularly, might have found the weapon and did not"). Indeed, as we demonstrate in the petition for certiorari, Cert. Pet. 18-20, the case that there is a genuine issue of material fact here is even stronger than the district court asserted.

Respondents argue strenuously that there is "evidence" supporting *their* version of events. See Opp. Cert. 19-20. That makes no difference. The district court did not determine that there was *no* evidence to support the officers' version of events; the district court determined only that there was sufficient evidence that things "did *not* happen as the officers said" to require trial. App. A46 (emphasis added). The district court, of course, did not make *any* judgment about the officers' credibility and has not determined that the officers were lying or that Elliott in fact had no gun at the time of the shooting. It held only that these are questions for trial. The district

court issued an appropriately measured ruling, stating that

> it may well be that the officers are telling the truth, and I don't presume that one way or another. . . I think fairly . . . there are enough circumstances that a judge making this as a preliminary call could say that a reasonable trier of fact could come to a conclusion that things simply did not happen as the officers said they did.

App. A45-46.

3. Respondents' brief in opposition *could* be read to argue that summary judgment should not have been denied here — and that an appeal was not jurisdictionally barred — because the petitioners did not *themselves* come forward with the evidence on which they rely. See, *e.g.*, Opp. Cert. 18 (petitioners "offered no" evidence); *id.*, at 19 (petitioners did not "fulfill their burden on summary judgment to refute the evidence demonstrated by Respondents with evidence that would be admissible at trial"). The suggestion would be that the court of appeals had jurisdiction to hear *this* legal issue — whether the nonmovants produced their *own* evidence.

But if respondents intend to advance such a view, they simply misunderstand the procedure for summary judgment, which is to be decided on the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any." Fed. R. Civ. P. 56(c). It is well settled that there is no requirement that the *nonmovant* introduce the evidence upon which it would rely to defeat a motion for summary judgment, and that one may oppose summary judgment in reliance on whatever material is in the record before the district court. See *Celotex Corp.*, 477 U.S. at 324; 10A Wright, Miller & Kane, *Federal Practice and Procedure* § 2727, at 138-142 (1983).

4. Finally, respondents raise their jurisdictional argument, a smokescreen designed to obscure matters just enough to deter this Court from appropriately exercising its certiorari jurisdiction. This Court should not be misled.

a. Even without the court of appeals's re-entry of judgment, the

petition for certiorari in this case was timely. See Cert. Pet. at 14 n.5. For the court of appeals recalled its mandate without explanation on the very day it issued. This action served to suspend the finality of the court of appeals's judgment, rendering any certiorari petition prior to the denial of rehearing premature. See *Missouri* v. *Jenkins*, 495 U.S. 33, 46 (1990). A mandate may properly be recalled "only when good cause or unusual circumstances exist sufficient to justify a modification or recall of a prior judgment." *Nevius* v. *Sumner*, 105 F.3d 453, 460 (9th Cir. 1996) (internal quotation marks and citation omitted). When a court of appeals recalls its mandate, as the court below did on December 2, 1996, it thus eliminates the certainty and finality of the judgment that are the necessary "prerequisite to a review in this Court." *Department of Banking of Nebraska* v. *Pink*, 317 U.S. 264, 268 (1942) (per curiam).[4]

Respondents suggest, citing this Court's Rule 13.3, that only a "petition for rehearing . . . timely filed in the lower court by any party" will stop the certiorari clock running. It is settled, however, that certain actions other than the "timely fil[ing]" of a petition for rehearing described in Rule 13.3 will serve to toll the time for filing a petition for certiorari. This is not because of any rule of this Court, but because these actions — like the timely filing of a rehearing petition — prevent "the judgment of the [lower] court as originally entered . . . . [from] becom[ing] final," as required in order for the jurisdictional time limit for filing for certiorari under 28 U. S. C. § 2101 to run. See, *e.g.*, *Bowman* v. *Loperena*, 311 U.S. 262, 266 (1940) (time tolled by lower court consideration on the merits of untimely petition for rehearing even when it was ultimately denied); *Pink*, 317 U.S. at 266 ("motion for reargument or rehearing"); accord *Jenkins*, 495 U.S. at 46 (petition for rehearing suspends finality of

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[4] Indeed, in those circumstances in which respondents agree that finality of the court of appeals's judgment is suspended, that suspension is reflected in a stay of the mandate. See Fed. R. App. P. 41(a) (timely filing of a petition for rehearing stays mandate which must issue seven days after entry of an order denying the petition). By contrast, in those circumstances in which the finality of the court of appeals's judgment is not suspended, the mandate is not stayed. See Fed. R. App. P. 35(c) (the pendency of a suggestion for rehearing *en banc* shall not "affect the finality of the judgment of the court of appeals or stay issuance of the mandate").

lower court's judgment so that "while the petition for rehearing is pending, there is no 'judgment' to be reviewed").[5]

It is certainly clear that the Fourth Circuit understood and intended that its order recalling the mandate would suspend the finality of its judgment and stop the time for filing for certiorari. The court of appeals treated the mandate exactly as it would have if that court had pending before it a finality-suspending petition for rehearing. It issued its mandate seven days after its order denying rehearing. See Fed. R. App. P. 41(a). More importantly, the decisional law of the Fourth Circuit makes clear that that court treats its orders recalling the mandate as suspending the finality of judgment and stopping the time for seeking review in this Court. See *Moore* v. *United States*, 360 F. 2d 353, 357 n. 1 (4th Cir. 1965), cert. denied, 385 U.S. 1001 (1967).[6]

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[5] Indeed, for this reason this Court has consistently treated petitions for rehearing as tolling the time for seeking certiorari, independent of its adoption of Rule 13.3. See *Pink*, 317 U.S. at 266.

[6] Respondents suggest that the court of appeals's action did not suspend the finality of the court of appeals's initial judgment because, under this Court's Rule 13.3, "[a] suggestion . . . for a rehearing en banc is not a petition for rehearing within the meaning of this Rule unless so treated by the United States court of appeals." S. Ct. R. 13.3. Our primary argument of course has been that the order recalling the mandate, and not the court of appeals's *sua sponte* suggestion for rehearing *en banc*, stopped the certiorari clock, see Cert. Pet. 14 n. 5, not because it was a "petition" within the meaning of Rule 13.3, but because of its operative effect. Respondents' argument demonstrates, however, an independent reason their jurisdictional claim is wrong. All the evidence suggests that the court of appeals treated the suggestion for rehearing *en banc*, which it ultimately denied, as a petition for rehearing, bringing the matter within the scope of Rule 13.3 itself. The court of appeals recalled its mandate, which it would not have been required to do if it were considering only a suggestion for rehearing, see Fed. R. App. P. 35(c), and it followed the procedure for issuance of the mandate prescribed in Fed. R. App. P. 41(a), which addresses petitions for rehearing. This alone suffices under Supreme Court Rule 13.3 to render January 24, 1997, the date on which the court of appeals's judgment became final. See *Jenkins*, 495 U.S. at 48 (the court of appeals's use of the mandate-issuance procedure required in cases of denial of a petition for rehearing by Fed. R. App. P. 41(a) demonstrates that the court of appeals "interpreted and actually treated" the motion before it as "a petition for rehearing before the panel"); see also 4th Cir. R. 35(a) ("A suggestion for rehearing in banc must be made at the same time, and in the same document,

b. In any event, in light of the circumstances created by the court of appeals's unusual orders, petitioners acted in accord with the precedents of this Court to ensure that there could be no debate about the timeliness of the petition for certiorari. They sought re-entry of judgment as of the date of the denial of rehearing *en banc*. And this motion was granted without dissent by the *en banc* court of appeals.

Precisely this practice has been expressly approved by this Court. See *Wilkins* v. *United States*, 441 U.S. 468, 469-470 (1979) (per curiam) (re-entry of judgment will permit "fil[ing of] a timely petition for certiorari" even when undertaken after expiration of the original time for seeking certiorari); *Doherty* v. *United States*, 404 U.S. 28, 29 (1971) (per curiam) (remanding for re-entry of judgment so that petitioner's time for filing a petition will run anew); *id.*, at 36 (Douglas, J., concurring). Respondents do not specifically address the cases from this Court cited by petitioners, only suggesting vaguely that they are distinguishable because they are criminal cases. See Opp. Cert. 15 n. 25. But that is immaterial. These were not cases in which the Court chose to *waive* the time limit for seeking certiorari, a power that the Court has in criminal cases because the time limit there is not jurisdictional. Cf., *e.g.*, *Durham* v. *United States*, 401 U.S. 481, 481-482 (1971) (per curiam). Rather, these were cases in which this Court made clear that re-entry of judgment would permit "the time within which [petitioner] may file his certiorari papers [to] run anew." *Doherty*, 404 U.S. at 36 (Douglas, J., concurring).

c. Finally, respondents' suggestion that petitioners have "utter[ly] disregard[ed]" this Court's rules cannot go unanswered. Petitioners have done nothing to violate any rule of this Court. This is not a circumstance, as respondents may be read to suggest, where petitioners *sought* delay, but failed to comply with the Rule 13.3 requirement of filing a petition for rehearing. See Opp. Cert. 12. The court of appeals's recall of its mandate was not sought nor was it caused by any action of the petitioners. Indeed, after the court of appeals's judgment was initially entered, petitioners intended, and they instructed their attorneys on their behalf, to file a petition for certiorari before this Court challenging the court of appeals's exercise

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as a petition for rehearing.").

of appellate jurisdiction. And, after the court of appeals issued its order denying rehearing, petitioners took the appropriate course described by this Court's precedents to ensure that there could be no doubt whatever about this Court's jurisdiction to entertain that petition.

CONCLUSION

Most telling is respondents' invitation that this Court ignore the need for uniformity in federal law, and for adherence by the lower courts to its precedents. To be sure, "the Fourth Circuit . . . is not required to interpret every case exactly the way every other circuit interprets it," Opp. Cert. 23, and "the Fourth Circuit is not bound by decisions of other circuits." *Id.* (capitalization omitted). But it is axiomatic that the Fourth Circuit, no less than any other, is bound by the decisions of this Court, which expends much of its energy precisely to resolve conflicts among the lower federal courts. When uniformity of federal law is disrupted not merely by one court of appeals's failure to follow "decisions of other circuits," Opp. Cert. 23, but by its failure to follow this Court's clear command in decisions the "clear import" of which "[o]ther federal courts have had no difficulty in following," this Court has found it appropriate to grant certiorari and to summarily reverse. See *Thurston Motor Lines, Inc.* v. *Jordan K. Rand*, 460 U.S. 533, 534-535 (1983) (per curiam). That is the course this Court should take here.

Unlike a situation in which a court of appeals has, at worst, misapplied a settled rule of law to the particular facts before it, here the court of appeals has employed transparently circular reasoning to avoid the import of clear and recent decisions of this Court that limit the scope of appellate jurisdiction. See *supra* at 4. In such circumstances, particularly since the question is one of *judicial power*, even if one were to conclude that the court of appeals had, in passing, also correctly *described* the limits of its jurisdiction as set forth in this Court's clear precedents, the court of appeals's action outside those jurisdictional limits, in unmistakable defiance of these precedents, would clearly warrant reversal.

This Court should therefore grant certiorari, summarily reverse or vacate the judgment of the Fourth Circuit, and remand the case to that court with directions that the appeal be dismissed for want of jurisdiction.

Respectfully submitted,

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